Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CESAR XAVER BARROS,

Petitioner,

v.

JEFFREY BEARD, Secretary, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **DID THE COURT OF APPEALS COMMIT AN ERROR OR LAW IN FAILING TO GRANT THE PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY UNDER 28 U.S. CODE §2253 WHERE THE PETITIONER DEMONSTRATED THAT HE WAS DENIED HIS FEDERAL CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL?**

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See attached exhibits from United States District Court for the Eastern District of Pennsylvania, to wit, Report and Recommendation of U.S. Magistrate Judge filed March 27, 2009 (19a) and Memorandum Opinion of United States District Court for the Eastern District of Pennsylvania, filed September 8, 2009 (3a).

JURISDICTION

This Court has jurisdiction to entertain the Petitioner's claim that his right to the effective assistance of counsel under the Fourteenth Amendment of the United States Constitution has not been honored in this case. A writ of certiorari is authorized sur 28 U.S. Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides that a Defendant is entitled to the assistance of counsel, which provision has been made applicable to the states pursuant to the Fourteenth Amendment.

STATEMENT OF THE CASE

This matter arises from an incident which occurred on December 3, 1999 in Allentown, Pennsylvania, at which time Gamaliel Colon was shot to death. The Petitioner Cesar Xaver Barros was charged with Murder, Conspiracy and related offenses in the Court of Common Pleas of Lehigh County as per Criminal Division Docket Number 0212/2000. Following a trial by jury before the Honorable William E. Ford, the Petitioner was convicted of Murder of the Third Degree and VUFA on November 3, 2000. On December 19, 2000, Judge Ford sentenced the Petitioner to a total term of not less than 21 nor more than 45 years imprisonment.

The Petitioner took a direct appeal to the Superior Court of Pennsylvania as per No. 307 EDA 2001. On December 23, 2003, that Court affirmed the judgment of sentence. Petitioner's claims of ineffective assistance of counsel which had been advanced in that appeal were dismissed without prejudice so that the Petitioner could present such claims in a PCRA petition. On April 12, 2004, the Petitioner filed said petition. Following an evidentiary hearing on November 17, 2004, Judge Ford denied the PCRA Petition in an Order dated June 29, 2005. On May 11, 2006, the Superior Court affirmed that Order. The Petitioner filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania on June 8, 2006 but the same was denied by Order dated December 5, 2006.

The Petitioner filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Pennsylvania on March 20, 2007. (38a) In that petition, the Petitioner alleged three claims of ineffective assistance of counsel in contravention of the rule set forth in Strickland v. Washington, 466 U.S. 668 (1984). Those claims were the following:

(a) There was sufficient evidence presented at Petitioner's jury trial to warrant an instruction on Voluntary Manslaughter, including testimony that the victim and his armed cohorts surrounded and confronted the Petitioner in an aggressive manner, thus provoking the Petitioner to react as he was acting in a state of fear that would have impassioned a reasonable man to act without cool reflection, or to act to defend himself due to an unreasonable or mistaken belief in self-defense sur 18 Pa.C.S. § 2503(a) or (b). This issue was adequately presented in the trial court but was not preserved in Petitioner's initial direct appeal Statement of Matters to be Complained of on Appeal sur Pa.R.App.Pro 1925(b) filed by trial counsel so that it was dismissed on this procedural basis by the Superior Court. When the record is viewed in a light most favorable to the Petitioner, as is required by Pennsylvania law, it is clear that the trial court abused its discretion by failing to provide the

jury with the option of a guilty verdict as to Voluntary Manslaughter. The Petitioner's prior attorney had no reasonable basis to

(b) omit this point of arguable merit in the Rule 1925(b) Statement. In the PCRA appeal, the Superior Court's affirmance of the denial of PCRA relief was an unreasonable application of Strickland v. Washington, supra, in that the record supported the giving of this instruction, thus depriving the Petitioner of due process of law. The Petitioner was prejudiced since the jury's verdict could have thereby been guilty of a degree of criminal homicide less than Murder of the Third Degree.

(c) Trial counsel should have objected when the trial judge instructed the jury that the element of malice for murder of the third degree exists if the slayer acts with an intent to kill, which is contrary to Pennsylvania law. When the jury asked the trial judge to redefine these terms, the court instructed that "all forms of malice qualify for Third Degree Murder", including intent to kill. The trial court was not asked to instruct the jury that the element of malice for Murder of the Third Degree does not involve an intent to kill, the omission of which caused undue confusion in the jury's deliberations. The failure to demand that the trial judge correctly define these elements violated the Petitioner's right to due process of

law. The cumulative effect of this error along with the omission of a jury charge regarding Voluntary Manslaughter caused prejudice to the Petitioner as the jury would not have fairly understood the true range of choices it had in deciding this criminal case.

(d) Joel Colon testified for the prosecution at trial and identified the Petitioner as the sole perpetrator of this shooting. A codefendant, Miguel Quinones, testified that he was present but had no weapon and was not the shooter. Another prosecution eyewitness, Jacqueline Close, testified that she saw the incident and that Miguel Quinones was the shooter. In two police statements that were not used at trial, Colon stated that both Petitioner and Quinones were shooting at the victim. The prosecutor argued to the jury in her closing address that Ms. Close's testimony was mistaken and that the Petitioner was the sole perpetrator. Therefore, the Petitioner's trial counsel was ineffective by unreasonably failing to pursue this course of arguable merit of challenging Joel Colon's inculpatory testimony with these prior police interviews. This resulted in prejudicing the Petitioner's right to a fair trial in view of the Petitioner's trial defense that the shooter was Miguel Quinones. Therefore, the Petitioner claimed that he was

entitled to the award of a new trial for this reason as well.

The habeas petition was assigned to the Honorable Linda K. Caracappa, United States Magistrate Judge, who issued a Report and Recommendation on March 27, 2009 recommending that the petition be denied (19a). Counsel for the Petitioner filed a Statement of Objections to that Report and Recommendation with United States District Judge Eduardo C. Robreno. By Memorandum filed September 4, 2009, Judge Robreno denied Petitioner's Petition for a Writ of Habeas Corpus and would not issue a Certificate of Appealability. Barros v. Beard, et al, 2009 WL 2924530 (E.D.Pa. 2009)(3a).[1]

The Petitioner filed a timely Notice of Appeal on October 1, 2009 seeking review of Judge Robreno's ruling and the decision to deny a Certificate of Appealability (59a).

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[1] The Petitioner notes that at the time of his decision on September 8, 2009, Judge Robreno appears to have been without the trial record (see Order of Court of Appeals entered December 22, 2009; 95a). Therefore, the Third Circuit erred by affirming the District Court's decision where the lower court failed to review all relevant parts of the state court record. Rhinehart v. Gunn, 598 F. 2d 557, 558 (9th Cir. 1979); Taylor v. Wilkinson, 2010 WL 3119489 (5th Cir. 2010).

The Petitioner argued before the Court of Appeals that his three claims of ineffectiveness of counsel which were presented in this habeas corpus petition were of such a nature that jurists of reason could find it debatable whether the Petition stated a valid claim of the denial of that constitutional right and whether the District Court was correct in its ruling against the Petitioner. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

By Order dated July 13, 2010, the Third Circuit denied the Petitioner's Application for Certificate of Appealability. The Petitioner, acting pro se, filed a Petition for Rehearing which was denied by the Court of Appeals by Order dated August 9, 2010 (96a).

STATEMENT OF REASONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE COURT OF APPEALS ERRED IN FAILING TO GRANT THE PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY IN A CASE WHERE THE PETITIONER WAS DENIED HIS FEDERAL CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The Petitioner Cesar Xaver Barros respectfully submits that the three claims of ineffective assistance of counsel that he presented in the instant Petition for a Writ of Habeas Corpus under 28 U.S. Code §2254 (38a) did represent a substantial showing of the denial of that constitutional right as required by 28 U.S. Code §2253(c). The Petitioner therefore asks this Court on review to reverse the Court of Appeals because the contentions presented by this Petition were debatable among jurists of reason and were significant enough to deserve encouragement to proceed further. Slack v. McDaniel, 529 U.S. 473 (2000).

I. OMISSION OF VOLUNTARY MANSLAUGHTER INSTRUCTION

Your Petitioner objects to the conclusion of the United States District Court that the Superior Court of Pennsylvania's decision rejecting his claim of ineffective assistance of counsel with respect to the instruction concerning the offense of voluntary manslaughter was not an unreasonable application of clearly established federal law under this Court's decision in Strickland v. Washington, 466 U.S. 668 (1984). The Petitioner respectfully disagrees with the District Court's determination that the evidence at trial failed to show that the Petitioner was entitled to a jury instruction on the offense of Voluntary Manslaughter. Clearly, this issue was worthy of the grant of a Certificate of Appealability.

At the trial of this case, trial counsel for the Petitioner requested an instruction as to the offense of Voluntary Manslaughter and contended that a key Commonwealth accomplice witness, Miguel Quinones, had testified as to significant aggressive behavior on the part of the victim, Gamaliel Colon, towards the Petitioner just before the shooting, which would have established a reasonable basis for the jury to return such a verdict. The trial judge ruled, however, that there would be no instruction regarding voluntary manslaughter due to a lack of evidence that the Petitioner acted in either the heat

of passion or with regard to mistaken self defense.

This ruling denied the Petitioner due process of law.

Under the law of Pennsylvania, a voluntary manslaughter instruction is warranted where the offense is at issue and the evidence could reasonably support such a verdict. Commonwealth v. Robinson, 721 A. 2d 344, 353 (Pa. 1998); United States ex rel. Matthews v. Johnson, 503 F. 2d 339 (3d. Cir. 1974). "Heat of passion" under 18 Pa.C.S. 2503(a) includes emotions such as anger, sudden resentment or terror, where such emotions may render the mind incapable of reason. Commonwealth v. Speight, 677 A. 2d 317, 324 (Pa. 1996). In this case, the Pennsylvania Superior Court relied upon the fact that the Petitioner did not testify to establish that he was provoked by terror or passion. As a matter of due process of law, the Petitioner submits that whether a provocation on the part of a victim was sufficient to support a verdict of voluntary manslaughter is to be determined by an objective standard, i.e., whether a reasonable man, confronted by the same series of events, would have become impassioned to the extent that his mind would have been incapable of acting with cool reflection. Commonwealth v. McCusker, 448 Pa. 382, 389-390 (1972); Commonwealth v. Harris, 472 Pa. 406, 408 (1977). The jury should have been instructed that if it found that the

accused had been confronted with adequate provocation, the focus would then shift to whether there was evidence that would have supported an inference that the Petitioner had acted in the heat of passion as a result of that provocation. The law in Pennsylvania did not require the evidence to establish that the Defendant was motivated by a mental element (passion, terror, etc), only that the Defendant had an objectively reasonable belief that deadly force was necessary at that moment to protect himself from death or serious bodily injury. Commonwealth v. Cain, 398 A. 2d 1359, 1362 (Pa. 1979). The law does not require proof that the Defendant's fear or apprehension reach such an intensity as to block cool reflection and that the shooting resulted from those emotions. Id. at 1363. Therefore, the District Court's contrary conclusion should not stand.

Petitioner submits that this Court should rule that, as a matter of due process of law, the Petitioner cannot be penalized because he did not take the stand. Neither the Superior Court's Opinion nor that of the District Court cites any cases that hold that the Petitioner must testify in order to be entitled to such an instruction. To the contrary, see Commonwealth v. Monroe, 322 A. 2d 100, 101 (Pa. 1974) (even though defendant did not take the stand, jury can infer defendant's act of shooting victim was motivated by fear of danger from group of men advancing towards him in a threatening manner so as to support a verdict of voluntary manslaughter).

In addition to the concept of passion and provocation, Voluntary Manslaughter could also have been found if the Petitioner acted out of an unreasonable or mistaken belief that self-defense was then and there necessary pursuant to §2503(b). See Suggested Standard Jury Instructions in Criminal Cases, § 15.2503A and Commonwealth v. Galloway, 485 A. 2d 776 (Pa. Super. 1984). Here, the jury should have been instructed that if justification was not established, the killing could have been voluntary manslaughter (and not murder) if the jury found that the Petitioner believed that the killing was committed pursuant to a belief that the use of deadly force was necessary in order to defend himself against death or serious bodily injury, even though that belief may have turned out to have been mistaken or unreasonable. Under Commonwealth v. Nau, 473 Pa. 1 (1977), a person who commits unreasonable belief voluntary manslaughter may hold his mistaken belief about the necessity of self defense without being subject to the strong emotion of sudden passion or he "may be mistaken because he was the aggressor" or was otherwise not entitled to use deadly force. Commonwealth v. Galloway, supra at 784.

Accordingly, the Petitioner respectfully submits that unreasonable belief voluntary manslaughter and/or heat of passion voluntary manslaughter had been made an issue in the case and that the evidence could have reasonably supported such a verdict. Be

cause Pennsylvania law provides that the evidence should have been viewed in a light most favorable to the accused in determining whether he was entitled to this instruction, Commonwealth v. Morris, 424 A. 2d 1336, 1337 (Pa.1981), the trial judge's refusal to give this charge was error, and prior counsel was ineffective in failing to preserve this claim for appellate review.

The testimony at the trial supports the Petitioner's argument. In the direct examination of key Commonwealth witness Joel Colon, Colon testified that on December 3, 1999 at sometime after midnight, there was a knock on the door of the residence in which were the victim, Gamaliel Colon, Joel Colon, the victim's girlfriend Jennifer Negron and a friend named "Sess". Gamaliel went to the door and then said, "Oh, shit, it's Ces (the Petitioner), Mike (Miguel Quinones) and Ralph. According to Joel Colon, his brother Gamaliel went to get his gun and bullet proof vest and then went outside, followed by Joel Colon. Outside in the parking lot, according to Joel Colon, he saw a flash coming from Petitioner's direction towards his brother.

After Joel Colon realized that his brother was shot, he noted that a gun was lying next to his brother, which Joel then grabbed and used to fire twelve (12) shots in the direction of the Petitioner. Petitioner received two bullet wounds.

According to Joel Colon, his brother Gamaliel had the gun in his jeans pant pocket. When Joel Colon saw it after the shooting, the gun was lying next to the shoulder area of Gamaliel. According to Joel Colon, it was "obvious" to him that his brother had tried to pull out the gun before he was shot, and then had dropped the gun to the ground.

Commonwealth witness Jennifer Negron testified that her boyfriend Gamaliel Colon was "a lot bigger in size" than this Petitioner. Pathologist Sarah Funke M.D., testified that Gamaliel Colon was 22 years old and weighed 220 pounds. Commonwealth accomplice witness Miguel Quinones also testified that Joel and Gamaliel Colon were "much bigger" than either Miguel Quinones or Cesar Barros; in addition, the Colon brothers' friend Sess was also "a pretty big guy".

Miguel Quinones testified as to his version of these events, which differed from the testimony of Joel Colon. According to Quinones, he, "Ralph" and the Petitioner went to Joel Colon's house where the Petitioner knocked on the door. Quinones testified that Gamaliel, Sess and Joel came out of the house, with Joel pointing a gun. Quinones testified that "Sess" had a gun in his hand as well. Quinones testified that Joel Colon waved a gun in the face of Quinones and Barros. At this point, Quinones testified, Gamaliel "started blowing his chest up in Cesar's face". In response, Cesar "stepped back, put his arms up and told him to back up", after which

Quinones testified he heard a gunshot. Quinones also testified that at the time a gun was fired at Gamaliel Colon, the victim had his arms going forward.

Quinones also testified that he did not see the victim with a gun that night and that no one was aiming a gun at the Petitioner when Gamaliel was shot. According to Quinones, Joel Colon was about 10 to 15 feet away from the Petitioner at the time of the shooting. However, on cross-examination Quinones testified that, although Joel Colon and Sess had guns out, neither he, Ralph nor the Petitioner had guns out prior to the shooting.

Dr. Funke testified that the bullet trajectory in the victim's body was on a line from right to left and on a severely downward angle . According to Dr Funke, at the time of being shot, the victim could have been "bending his knees", and therefore may have been in a posture where the victim was crouched over and charging at the Petitioner.

Based upon the above trial evidence, the Petitioner respectfully submits that the trial judge should have granted the Petitioner's request that the jury be instructed regarding Voluntary Manslaughter, either as to 18 Pa.C.S. § 2503(a) or § 2503(b). When viewed under the proper standard, to wit, in the light most favorable to the accused, it is clear that there was sufficient evidence to support an inference that the Petitioner, if he was to be judged culpable for the shooting of Gamaliel Colon, did so

while acting under a serious provocation. The jury could certainly have found that Gamaliel Colon, armed with a gun and bullet proof vest, aggressively approached the Petitioner, sticking his chest into the Petitioner's face, while bent over at the knees as if to charge at the Petitioner, while Colon's associates, armed with weapons, supported the victim's advance and pointed guns at the face of the Petitioner. Even without the Petitioner's testimony, the jury have could inferred from this series of events that this would have actually caused extreme terror and emotion on the part of the Petitioner. In the alternative, these acts could have generated an unreasonable or mistaken belief that the Petitioner would have had to use deadly force at that time and place in order to protect himself from what a reasonable person would have perceived as a danger of death or serious bodily injury. As discussed above, the federal Constitution should not require that the Petitioner himself must take the stand to warrant such a jury charge.

Therefore, your Petitioner respectfully submits that the Petitioner's request for a Voluntary Manslaughter instruction should have been granted. Particularly when this issue is viewed in light of the Petitioner's claim (see next argument) regarding the trial judge's instructions concerning third degree murder and malice, the prejudice to the Petitioner becomes evident. As a result of the instructions regarding malice, the jury was incorrectly lead to believe that the offense of third degree murder could

include a situation where the Petitioner acts with an intent to kill, yet in this same case, the jury was not given the option of finding the Petitioner guilty of Voluntary Manslaughter. The Petitioner submits that such a verdict might have occurred, based upon a theory of provocation and terror, or, in the alternative, upon a theory of an unreasonable or mistaken belief in self-defense, with a finding that the Petitioner acted with an intent to kill but without the deliberation and premeditation required for first degree murder.

For these reasons, the Court should reverse the lower court and order the grant of a Certificate of Appealability for the Petitioner.

II. MALICE INSTRUCTIONS

Before the Third Circuit, the Petitioner objected to the conclusion of the United States District Court that his claim of trial counsel ineffectiveness in failing to object to the jury instructions regarding first and third degree murder with respect to the element of malice was without merit. A Certificate of Appealability as to this claim should have been granted.

When the trial court instructed the jury as to the elements of third degree murder on November 2, 2000, the court properly informed the jury that third degree murder is a killing accompanied by malice; however, the court then erred by stating that malice exists for third degree murder if the slayer acts with

an intent to kill. This erroneous instruction was repeated in response to a jury question on November 3, 2000. The judge also told the jury that "all forms of malice qualify for third degree murder". Trial counsel took no exception to any aspect of the trial judge's charge. When the jury resumed deliberations on the next day, they asked the trial court to define "malice, as it pertains to first degree and third degree". Without objection from counsel, the trial judge repeated the essential terms of the instruction regarding malice that had been given on the preceding day. In particular, however, when attempting to define the distinction between the malice that is required for Murder of the First Degree and that required for Murder of the Third Degree, the trial judge told the jury that, "All forms of malice qualify for Third Degree Murder" (N.T. 11/3/00, 18) (emphasis supplied).

Under the law of Pennsylvania, it is fundamental that a trial judge, in charging the jury, clarify the issues so that the jury may understand the questions to be resolved. Commonwealth v. Beach, 438 Pa. 37 (1970). Thus the trial judge had the duty to apprise the jury of all the elements of those crimes for which the defendant had been charged. The trial court's instructions in that regard must be clear, concise and accurate statements of the law. Commonwealth v. Ford-Bey, 472 A. 2d 1062, 1064 (Pa. 1984). While it is true that a reviewing court must consider the charge as a whole, relief is required under the federal constitution where these elements have not

been satisfactorily explained under the law. In Re Winship, 397 U.S. 358 (1970); Jacob v. Horn, 395 F. 3d 92, 111 (3d. Cir. 2005).

Although third degree murder is a killing done with malice, it should have been made clear to the jury that it is not an intentional killing; i.e., the defendant may have maliciously killed the victim but not with a specific intent to kill as is required for murder in the first degree. Commonwealth v. Pitts, 404 A. 2d 1305 (Pa. 1979); Commonwealth v. Cohen, 605 A. 2d 1212, 1216 (Pa. 1992). Instead, for Third Degree Murder, what is required under Pennsylvania law is proof that the defendant manifested either an intention to inflict serious bodily injury or an extreme indifference to the value of human life. Commonwealth v. Thomas, 717 A. 2d 468, 479 (Pa. 1998).

As a result, the burden of proof as to these offenses was not fairly presented to the Petitioner's jury.

Petitioner urges this Court to reject the District Court's conclusion that these confusing instructions on malice and Third Degree Murder did not prejudice the Petitioner because the jury found the Petitioner not guilty of First Degree Murder, and guilty of Third Degree Murder. Petitioner submits that this is a conclusion that rests on conjecture and that he was constitutionally entitled to have the jury accurately, fully and properly instructed as to the distinctions between the various crimes and their

elements as a matter of fundamental fairness and due process of law. In re Winship, supra; Commonwealth v. Broeckey, 72 A. 2d 134, 136 (Pa. 1950); Commonwealth v. Murphy, 739 A. 2d 141, 146 (Pa. 1999).

See also Chambers v. McDaniel, 549 F. 3d 1191 (9th Cir. 2008) (jury instructions held unconstitutional, especially where second degree murder defined as "all other kinds of murder") and Polk v. Sandoval, 503 F. 3d 903 (9th Cir 2007) (same jury instruction on premeditation held constitutionally defective). In these cases, federal habeas relief was granted on the basis of a due process of law violation.

The Petitioner respectfully submits that he had a federal constitutional right to have his lawyer demand that the jury be given instructions on the law that were accurate and which apprised the jurors of all the elements of the offense. Strickland v. Washington, supra. In this case, the note from the jury during deliberations asking for the trial court to once again define "malice as it pertains to first degree and third degree" shows that the jury's deliberations were influenced by these confusing instructions. When considered in light of the absence of an instruction regarding voluntary manslaughter (see previous argument), there existed a reasonable probability that the outcome of this case may well have been different had the jury understood the true range of choices that it should have had with respect

to its verdict in this case. Strickland, supra at 694. Therefore, this Court should rule that the Petitioner should have been granted a Certificate of Appealability as to this claim as well.

III. CROSS-EXAMINATION OF JOEL COLON

The Petitioner respectfully submits that the conclusion of the United States District Court that trial counsel was not ineffective for failing to properly cross-examine key prosecution witness Joel Colon regarding his inconsistent police statements, in which Joel Colon stated that not only the Petitioner but Miguel Quinones had been shooting at the victim, was a legal error worthy of the grant of a Certificate of Appealability.

The Petitioner contends that prior counsel provided ineffective assistance under the federal constitution in failing to properly cross-examine key Commonwealth witness Joel Colon with his prior statements, which were inconsistent on the crucial factual issue at trial. It is fundamental that in order to provide effective assistance of counsel, trial counsel had an obligation to fully cross-examine the key prosecution witness. Strickland v. Washington, supra. In the instant case, the absence of proper cross-examination of key prosecution witness Joel Colon was an omission of a matter of arguable merit that would have affected the outcome of the case because Colon's previous inconsistent statements directly bore on the credibility of both Colon and Quinones

and thus the Petitioner's culpability. Berryman v. Morton, 100 F. 3d 1089, 1099 (3d Cir. 1996); Malone v. Walls, 538 F. 2d 744, 761 (7th Cir. 2008); Harris v. Senkowski, 298 F. Supp. 2d 320, 337 (E.D.N.Y. 2004)

In the two statements attributed to Joel Colon by the Allentown Police Department, Joel Colon told the police that both Cesar Barros, Petitioner herein, and Miguel Quinones were shooting at Joel Colon and his brother Gamaliel Colon. During the trial, trial counsel for the Petitioner did not attempt to bring these references out during the cross-examination of Joel Colon, even though Joel Colon testified that the Petitioner alone shot at his brother. As to Miguel Quinones, Joel Colon testified at the trial that his eyes were focused on Miguel Quinones but he could not see Miguel Quinones' hands. Joel Colon testified that before the gun shots rang out, he saw no one with a gun. He testified that at the time of the shooting, the Petitioner, Joel Colon and Gamaliel Colon were standing in a triangle only three feet apart from each other. The prosecutor specifically asked Joel Colon whether or not Miguel Quinones was observed to have anything his hand, to which Joel Colon responded that Quinones "had his hand in his pocket" and that Joel Colon could therefore not see the hand of Miguel Quinones.

Miguel Quinones testified at the trial as a Commonwealth witness and completely denied any criminal activity in connection with the shooting of Gamaliel Colon. Quinones testified that he did not

have a gun, but that guns were in the possession of Joel Colon, "Sess" and the Petitioner and specifically denied that he had a gun that night.

In her closing argument to the jury, the prosecutor relied upon the testimony of Joel Colon and Miguel Quinones to support her contention that this Petitioner was the shooter of Gamaliel Colon. The prosecutor argued that the testimony of Jacqueline Close, which had identified Miguel Quinones as the shooter, was mistaken.

Accordingly, the Petitioner respectfully submits that the failure on the part of trial counsel to properly use the prior police statements of Joel Colon deprived the Petitioner of his federal constitutional right to the effective assistance of trial counsel. The records shows that trial counsel was familiar with these statements, having used them for other purposes in the cross-examination of Joel Colon. Thus it was an unreasonable strategy on trial counsel's part to omit such references where Colon's trial testimony was dramatically inconsistent with his police interviews on this crucial point. Harris v. Senkowski, supra at 338.

The District Court accepted the conclusion of the Pennsylvania Superior Court that these references might have damaged the Petitioner's defense. The Petitioner respectfully submits that this conclusion was not supported by the record as it disregards the defense that was actually used at the trial, to wit,

that Miguel Quinones was the shooter. Rolan v. Vaughn, 445 F. 3d 671, 681 (3d Cir. 2006) (state court has made an unreasonable finding of fact where it is not supported by the record). Although the defense also took the position that the Petitioner was not a shooter, and Joel Colon's statement did refer to the Petitioner in that role as well as Quinones, the Petitioner notes that the reference to the Petitioner as a shooter had been already brought out at the trial by both Joel Colon and Miguel Quinones. Therefore, another such reference, attributed again to Joel Colon, would not have been a valid basis to forego this cross-examination, especially in light of the importance of letting the jury hear that Miguel Quinones may have been the person who fired the shot that killed Gamaliel Colon. Thus in one fell swoop, the defense could have severely undercut the credibility of the prosecution's two primary witnesses, Joel Colon and Miguel Quinones.

In reviewing an ineffectiveness claim under Strickland, this Court must examine the approach employed by trial counsel in light of the available alternatives; here, the alternative not chosen (impeaching Joel Colon with the two prior police statements to establish the fact that Miguel Quinones and Joel Colon had lied and that Quinones was a shooter) clearly offered a potential for success substantially greater than the tactic actually utilized (not making that reference at all). Bell v. Miller, 500

F. 3d 149 (2nd Cir. 2007) (no justification for state counsel having omitted impeachment that could have cast doubt upon critical evidence and bolstered defense theory); Harris v. Senkowski, supra at 340-341.

Therefore, the Petitioner submits that a Certificate of Appealability was warranted because the failure of trial counsel to bring out these dramatic inconsistencies with respect to the role of Miguel Quinones created a reasonable probability that the outcome of the trial may well have been different had Joel Colon been made to testify that Miguel Quinones was an active shooter in this incident, as this would not have only undercut the credibility of Joel Colon and Miguel Quinones, it would also have supported the credibility of another key witness, Jacqueline Close, who testified at the trial that the shooter was not the Petitioner but rather it was Miguel Quinones. The jury apparently rejected Ms. Close's testimony, which is what the prosecutor urged them to do in her closing argument. The Petitioner notes that in the decision of the Superior Court rejecting this claim, that court did not consider the testimony of Jacqueline Close which, had it been supported, may well have created a reasonable doubt as to the Petitioner's guilt. Therefore, the Joel Colon police statements would have bolstered the defense that Quinones was culpable and would have also served to undermine the prosecution's argument that Close was "mistaken" when she identified

Quinones as the shooter. Rolan v. Vaughn, supra at 683.

As a result of this omission, the argument of Petitioner's defense attorney fell short. The evidence against the Petitioner had substantial weaknesses as these two key witnesses were vulnerable with respect to their credibility. Malone v. Wells, supra at 761. Although Joel Colon was impeached on cross-examination, he was not challenged as to his testifying that the Petitioner alone was the shooter of his brother. Thus there was no rational basis for this omission. Accordingly, this Court should rule that the Petitioner should have been granted a Certificate of Appealability for this reason as well.

CONCLUSION

This Court has held that a Petitioner should receive a Certificate of Appealability if he has made a substantial showing of the denial of a constitutional right, that is, that reasonable jurists would find that the District Court's assessment of his constitutional claim was debatable or wrong. Tennard v. Dertke, 542 U.S. 274, 282 (2004). Furthermore, if the Petitioner can demonstrate that the issues that he has presented were adequate to deserve encouragement to proceed further, a COA is appropriate. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). As this Court stated therein, a claim can be debatable even though every jurist of reason might agree that the Petitioner may not prevail after the COA has been granted and the case has received full consideration. Id. at 338.

In the present case, the Petitioner Cesar Barros respectfully submits that he has met that standard for the granting of a Certificate of Appealability and that, in view of the circumstances discussed above, the ruling to the contrary by the United States Court of Appeals for the Third Circuit should not stand.

Respectfully submitted,

Burton A. Rose, Esq.
Attorney for Petitioner

APPENDIX

APPENDIX A – ORDER, FILED JULY 13, 2010

DLD-239 July 9, 2010

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 09-3889

CESAR XAVER BARROS

VS.

JEFFREY BEARD, Secretary, et al.

(E.D. Pa. No. 2-07-cv-01300)

Present: FUENTES, JORDAN AND HARDIMAN, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

MMW/CAC/mb/ww

ORDER

The foregoing request for a certificate of appealability is denied. For substantially the reasons given by the District Court in denying the Appellant's petition, we conclude that he has failed to make a "substantial showing of the denial of a constitutional right" as to any of his claims. See 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

By the Court,

/s/ Thomas M. Hardiman
Circuit Judge

Dated: July 13, 2010
MB/cc: Burton A. Rose, Esq.
Heather F. Gallagher, Esq.

APPENDIX B – MEMORANDUM, FILED SEPTEMBER 8, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CESAR BARROS,	:	CIVIL ACTION
Petitioner,	:	No. 07-1300
	:	
v.	:	
	:	
JEFFREY BEARD	:	
Respondent.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. September 4, 2009

Petitioner Cesar Xaver Barros, filed this habeas corpus petition under 28 U.S.C. §2254, collaterally attacking his sentence and asking the Court to vacate, set aside, or correct it. Petitioner alleges he was denied effective assistance of trial counsel, in violation of his Sixth Amendment rights

For the following reasons, Petitioner's § 2254 motion, will be denied.

I. PROCEDURAL HISTORY

On November 3, 2000, Petitioner was convicted of third degree murder and possession of a firearm without a license. On December 19, 2000, Petitioner was sentenced to 21 to 45 years incarceration for the murder charge and a consecutive one to five years incarceration for the firearm violation.

The Pennsylvania Superior Court affirmed the judgment of conviction and sentence and the Pennsylvania Supreme Court denied the petition for allowance of appeal. Petitioner filed a timely petition for collateral relief under the Post Conviction Relief Act ("PCRA"), which the PCRA court denied. The Pennsylvania Superior court affirmed the denial and the Pennsylvania Supreme Court denied the petition for allowance appeal. Petitioner then filed the instant habeas petition, pursuant to 28 U.S.C. § 2254, alleging ineffective assistance of counsel. (Doc. No.1). The Court referred the case to United States Federal Magistrate Judge Caracappa for a report and recommendation.

On February 28, 2008, Magistrate Judge Caracappa issued a report and recommendation, recommending that Petitioner's case be dismissed for

failure to exhaust administrative remedies at the state level. Petitioner objected to the report and recommendation, arguing that his administrative remedies were in fact exhausted. The Court sustained Petitioner's objection, found the petition to be properly exhausted, and remanded the case to Magistrate Judge Caracappa for consideration on the merits of the petition.

On March 27, 2009, in a well reasoned report and recommendation, Magistrate Judge Caracappa reviewed and denied each of Petitioner's ineffective assistance of counsel arguments (doc. No. 20). Petitioner filed three objections to the report and recommendation, challenging each of Magistrate Judge Caracappa's findings (doc. No. 21). Respondent filed responses thereto (doc.no. 23). Petitioner's habeas claims and objections to the report and recommendation are now ripe for decision.

II. ANALYSIS

The Antiterrorism and Effective Death Penalty Act ("AEDPA") sets forth the standards for reviewing state court judgments in federal habeas petitions filed pursuant to 28 U.S.C. § 2254. Werts v. Vaughn, 228 F.3d 178, 195 (3d Cir. 2000). The AEDPA increases the deference federal courts must give to the

factual findings and legal determinations of state courts. Id. at 196 (citing Dickerson v. Vaughn, 90 F.3d 87, 90 (3d Cir. 1996)). Pursuant to 28 U.S.C. § 2254(d), federal habeas relief may be granted only when the state court's decision is "contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States," or when the state court's decision is an "unreasonable determination of the facts" based on the evidence adduced at trial. 28 U.s.C. § 2254(d)(1)-(2); Williams v. Taylor, 529 U.S. 362, 412 (2000); Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001).

The "clearly established Federal law" that governs ineffective assistance of counsel claims is the two-ronged standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). Williams, 529 U.S. at 363 (stating that the "Strickland test qualifies as 'clearly established Federal law, as determined by the Supreme Court"). In order to prevail upon an ineffective assistance of counsel argument, a petitioner must meet the two-pronged test set forth in Strickland v. Washington, 466 U.S. 668 (1984). First, petitioner must show that his counsel's performance was deficient. Id. at 687. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth

Amendment. Id. Second, Petitioner must show that the deficient performance prejudiced the defense. Id.

In Petitioner's objections to the report and recommendation, Petitioner claims that his trial counsel was ineffective for three reasons: (1) failure to preserve the issue of whether the trial court erred in refusing to instruct the jury on voluntary manslaughter; (2) failure to object to the trial court's jury instructions regarding first and third degree murder; and (3) failure to adequately cross-examine prosecution witness Joel Colon. The Court considers each objection in turn.

A. Voluntary Manslaughter Jury Instruction

First, Petitioner alleges that his trial counsel was ineffective for failing to preserve for review the issue of whether the trial court erred in refusing to instruct the jury on voluntary manslaughter. Under Pennsylvania law, voluntary manslaughter occurs under two circumstances. First, where a person "kills another without lawful justification if, at the time of the killing, he is acting under a sudden and intense provocation by the person killed." 18 Pa.C.S. § 2503(a).[1] Second, where a person "intentionally or

[1] Provocation occurs where "a reasonable person, confronted by the same series of events, would become im-

knowingly kills an individual...if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing under Chapter 5 of this title, but his belief is unreasonable." 18 Pa.C.S. § 2503(b).[2] "A homicide defendant is entitled to a jury instruction on voluntary manslaughter only 'where the offence has been made an issue in the case and where the evidence would reasonably support such a verdict." Commonwealth v. Kim, 888 A.2d 847, 852-53 (Pa.1998).

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passioned to the to the extent that this mind would be incapable of cool reflection." Commonwealth v. Kim, 888 A.2d 847, 853 (Pa. Super. Ct. 2005) (quoting Commonwealth v. Galloway, 485 A.2d 776, 783 (Pa.Super.Ct. 1984). Such provocation must have actually caused the accused to have experienced a state of rage or passion. Commonwealth v. Berry, 336 A.2d 262, 264 9Pa. 1975)(citing Commonwealth v. Drum. 336 A.2d 262, 264 (1975) ('if there [is] provocation without passions...the killing will be murder")).

[2] "A person who commits unreasonable belief voluntary manslaughter may hold his mistaken belief about the necessity of self defense without being subject to the strong emotion of sudden passion or he may be mistaken because he was the aggressor or violated a duty to retreat." Commonwealth v. Galloway, 485 A.2d 776, 784 (Pa.Super.Ct. 1984)

Here, Petitioner argues that the voluntary manslaughter jury instruction was warranted based upon the following evidence: (1) prosecution witness Joel Colon (the victim's brother) testified that the victim had a gun in his pocket and had tried to pull it out before he was shot (Pet.'s Objs. To Report and Recommendation, p. 5_; (2) several witnesses testified that the victim was larger in size than Petitioner. (Id. at p.6); (3) prosecution witness Muguel Quinones testified that the victim was unarmed, but started "blowing his chest up in [Petitioner's] face." (Id.); and (4) Dr. Funke testified that due to the bullet trajectory in the victim's body, the victim could have been "bending his knees" and may have been in a posture where he was crouched over, charging at Petitioner (Id at p.7). Petitioner argues such evidence warrants a voluntary manslaughter instruction because it establishes an unreasonable or mistaken belief that Petitioner had to use deadly force.

The evidence offered by Petitioner fails to establish a record which "would reasonably support ...a [voluntary manslaughter] verdict." First, even assuming that the evidence could support an inference that the victim's actions created reasonable provocation, such evidence fails to show that Petitioner was in fact provoked. As the Superior Court noted, "it would not have been proper for the jury to

conclude, based on the evidence presented, that [Petitioner] acted while actually in a state of rage or passion. Rather, the jury would have been required to speculate concerning [Petitioner's] actual mental/emotional reaction to the alleged provocation." Commonwealth v. Barros, No. 2137 EDA 2005 (Pa.Super.Ct. May 11, 2006). Petitioner fails to identify any evidence which supports the notion that he acted because of such provocation. In the absence of such evidence, Petitioner is not entitled to the voluntary manslaughter instruction for the provocation purpose.

Second, Petitioner failed to identify evidence which suggest that the acted out of an unreasonable or mistaken belief that self defense was necessary. Similar to the rejection of the provocation argument, the evidence highlighted by Petitioner does not indicate that Petitioner believed it to be necessary to use deadly force.[3]

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[3] In fact, because the events leading up to the incident occurred over the course of a day, it is even less likely that Petitioner operated under the mistaken or unreasonable belief that self defense was necessary. However, even if he did so believe, other facts surrounding the altercation would not support a voluntary manslaughter instruction on this ground. Specifically, an altercation had occurred earlier in the day between Petitioner and the victim's brother and later that same day Petitioner came to the victim's home, armed with a gun, and knocked on the door. On these facts, Petitioner was not free from fault in provoking or continuing the

B. First and Third Degree Murder Jury Instruction

Next, Petitioner contends that his trial counsel was ineffective for failing to request a corrected jury instruction regarding the distinction between malice for first-degree murder and malice for third-degree murder. Specifically, Petitioner alleged that when the jury asked the court to define "malice, as it pertains to first degree and third degree" murder, the judge incorrectly instructed, "all forms of malice qualify for third degree murder." Petitioner argues that the judge should have explicitly stated that malice for first degree murder requires the intent to kill, while malice for third degree murder requires the intent to inflict serious bodily injury or to act with extreme indifference to the value of human life. See Commonwealth v. Pitts, 404 A.2d 1305, 1308 (Pa. 1979) (noting that "murder of the third degree is a killing done with legal malice but without specific

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altercation which resulted in the victim's murder. Commonwealth v. Broaster, 863 A.2d 588, 597 (Pa.Super.Ct. 2004) (noting that in order to establish imperfect self-defense to warrant voluntary manslaughter instruction, defendant must show that he was free from fault in provoking or continuing the difficulty which resulted in the slaying).

intent to kill"). Under Petitioner's interpretation of the trial court's instruction, the jury may have interpreted malice for third degree murder to include the intent to kill.

Even assuming that Petitioner's trial counsel's failure to seek correction on this instruction did constitute deficient performance to satisfy prong one of Strickland, Petitioner is unable to show that his inaction was prejudicial to his defense. Petitioner was convicted of third degree murder to include intent to kill, this interpretation resulted in a conviction of the lesser offence (third degree murder, rather than first degree murder) and did not prejudice Petitioner. On these facts, Petitioner cannot prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," as required by Strickland.

C. Failure to Cross-Examine Prosecution Witness

Finally, Petitioner contends that his trial counsel was ineffective for failing to properly cross-examine prosecution witness Joel Colon regarding inconsistent statements which directly bore on Petitioner's culpability. Specifically, Petitioner alleges that Joel Colon told the Allentown Police Depart-

ment the both Petitioner and Miguel Quinones were shooting at Joel Colon and the victim. However, during trial, Joel Colon testified that only Petitioner shot at victim. Petitioner's trial counsel did not cross examine Colon regarding this inconsistency.

An analysis of the record reveals that Petitioner's trial counsel extensively cross examined Joel Colon at trial. For at least three reasons, the decision not to question Joel Colon as to this specific inconsistency cannot be deemed to fall below an objectively reasonable standard, as required by Srickland.

First, Colon's statement to the Allentown Police Department (identifying both Petitioner and Miguel Quinones as shooters) directly conflicts with Petitioner's defense that he was not the shooter. Although the statement names Quinones as a shooter, it also identifies Petitioner as a shooter, thereby contradicting Petitioner's defense, and reiterating the accusation that Petitioner was the shooter. Accordingly, failure to question Colon on this statement is not objectively unreasonable.[4]

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[4] Petitioner argues that had his trial counsel questioned Colon regarding this statement, the jury would have been "inform[ed]" that "Quinones may have been the person who fired the shot that killed [the victim]." Even if Petitioner's counsel had questioned Colon

Second, Petitioner's trial counsel effectively impeached Colon on other grounds, even in the absence of questioning Colon on the inconsistent statement in question. Specifically, the jury heard the following evidence which operated to impeach Colon's credibility and character: (1) Colon was not truthful with the police about his involvement in shooting a weapon on the night of the incident. (Oct. 30, 2000, Trial Tr. Vol. I p. 228:19-24); (2) Colon was smoking marijuana the night of the incident (Id. at 222:18-25); (3) Colon had committed juvenile offenses, including receiving stolen property, and false reports to law enforcement (Id. at 83); and (4) Colon had charges pending against him for carrying a firearm, possession of controlled substances and

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regarding this statement, the statement would have been classified as hearsay evidence ("a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of matter asserted") and thus would have been inadmissible for the truth of the matter asserted. See Pa.R.E. 801 and 802. Petitioner does not indentify, or argue, any hearsay exception which would have permitted the jury to consider the statement for the truth of the matter asserted. Accordingly, the jury could have relied upon the statement for impeachment purposes only, and not as evidence that Quinones may have been the shooter.

unsworn falsification to law enforcement (Id. at 84-85).

Third, during his closing argument, Petitioner's trial counsel emphasized the impeachment evidence and challenged Colon's credibility:

> We have to look at Joel Colon's credibility. Joel Colon is a man whose been convicted of being a liar, giving false reports to police officers. This is nothing new to come into official places and give false information, for him. He's a man who has pled guilty to carrying firearms. He's a man who, from his own admission, is involved in a drug conviction, a receiving stolen property conviction.
>
> A remarkable record for a fellow twenty-two years old. And even after this incident, he's busted for carrying a firearm, possessing a firearm. Even after this incident. That's the Joel Colon, the package that they [the prosecution] want you to buy. (Nov. 2, 2000, Trial Tr. Vol., IV. P. 163-64).

Under these circumstances, Petitioner fails satisfy Strickland by showing that the cross examination of Joel Colon was deficient.[5]

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[5] In support of his ineffective assistance of counsel claim on this ground, Petitioner cites Bell v. Miller, 500 F.3d 149, 151 (2d cir. 2007), where the Second Circuit found that a habeas petitioner's trial counsel was ineffective for failure to consult a medical expert regarding the reliability of the victim witness who connected the petitioner to the crime.

Bell is distinguishable from this case. In Bell, the only evidence tying the petitioner to the crime was the victim witness' identification of the petitioner. Id. The victim was "held at gunpoint" and shot in the leg by his attacker. Id. Immediately after the attack, the victim, in a statement to police, "described the attacker generically," as "a black male, wearing a lemon colored shirt." Id. at 151-52. Eleven days after the attach, after losing "half his blood" as a result of the shooting and after regaining consciousness from an eleven day coma, the victim identified the attacker as his neighbor. Id. at 152. At trial, the emergency room surgeon testified to the victim's injuries, but petitioner's trial counsel failed to cross examine the doctor on "the effects of trauma, blood loss and painkillers on [the victim's] memory." Id. at 153.

In his habeas petition, the petitioner argued that his trial counsel was ineffective for failure to consult a medical

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expert witness regarding the impact of the trauma on the victim's reliability. Applying Strickland, the court held that because the reliability of the only evidence tying the petitioner to the case (the victim's testimony), was "highly vulnerable to attack by scientific evidence," "there [was] 'a reasonable probability' that had trial counsel consulted with a medical expert, ;the result of the proceeding would have been different.'" Id. at 155.

Unlike in Bell, Petitioner's trial counsel effectively cross examined Joel Colon, even in the absence of introducing Colon's inconsistent statement. In Bell, petitioner's trial counsel failed to "investigate the scientific implications of [the victim's] trauma," and thus, during cross examination of prosecution witnesses, he was "handicapped" in challenging the victim witness' reliability. Id. at 156. Here, as established above, Petitioner's counsel adequately challenged Joel Colon's credibility through other inconsistent statements, the introduction of criminal offenses bearing on Colon's truthfulness, and the introduction of criminal offenses bearing on Colon's truthfulness, and the introduction of Colon's marijuana use at the time of the incident, bearing on Colon's perception. Thus, failure to introduce the inconsistent statement at issue did not "handicap" Petitioner's trial counsel's cross examination of Colon, in the way that the failure to consult a medical expert impacted the petitioner's counsel's cross examination of prosecution witnesses in Bell.

III. CONCLUSION

For the reasons set forth above, Petitioner's objections to the report and recommendation will be overruled. The Report and Recommendation will be approved and adopted.

An appropriate order follows.

APPENDIX C – REPORT AND RECOMMENDATION, FILED MARCH 27, 2009

CESAR BARROS, Petitioner,	:	CIVIL ACTION
v.	:	
	:	No. 07-1300
JEFFREY BEARD Respondent.	:	

REPORT AND RECOMMENDATION

LINDA K. CARACAPPA
UNITED STATES MAGISTRATE JUDGE

Now pending before this court is a petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, by a petitioner currently incarcerated in the State Correctional Institution at Huntingdon, in Pennsylvania. For the reasons which follow, it is recommended that the petition be DENIED and DISMISSED.

I. PROCEDURAL HISTORY

On November 3, 2000, following a jury trial presided over by the Honorable William E. Ford, petitioner was convicted of third degree murder, and firearms not to be carried without a license. Specifically, petitioner was convicted of fatally shooting Gammaliel Colon during an argument with the victim. On December 19, 2000, petitioner was sentenced to not less that twenty (20) years nor more than forty (40) years imprisonment for third degree murder, and a consecutive term of not less than one (1) year nor more than five (5) years imprisonment for the firearms violation.

Petitioner filed a direct appeal to the Superior Court. On December 23, 2003, the Superior Court affirmed petitioner's judgment of sentence. The Pennsylvania Supreme Court denied petitioner's petition for allowance of appeal.

On April 12, 2004, petitioner filed a timely petitioner under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541, et seq. The PCRA court held a hearing on November 17, 2004. The PCRA court denied petitioner's PCRA petition on June 29, 2005. On May 11, 2006, the Pennsylvania Superior Court affirmed the PCRA court dismissal of the petition. On December 5, 2006, the Pennsylvania Supreme Court denied petitioner's request for allocatur.

Petitioner filed the instant petition for Writ of Habeas Corpus on March 20, 2007. Petitioner is alleging the following claims:

(1) Ineffective assistance of counsel for failing to preserve the issue of whether the trial court erred in refusing to instruct the jury regarding voluntary manslaughter;

(2) Ineffective assistance of counsel for failing to object to the trial court's jury instructions regarding first and third degree murder; and

(3) Ineffective assistance of counsel for failing to cross-examine prosecution witness, Joel Colon.

This court filed a report and recommendation on February 28, 2008, recommending petitioner's habeas petition be denied because the claims were procedurally defaulted. On September 8, 2008, the Honorable Eduardo C. Robreno, filed a memorandum and order that the report and recommendation was disapproved and remanded the case back to this court for a report and recommendation on the merits of petitioner's habeas petition.

Respondents retort that plaintiff's claims are meritless. We agree, and will discuss the merits of petitioner's claim hereinafter.

II. STANDARD OF REVIEW

Petitioner's claims are reviewed on the merits and subject to the following standard of review.

Under the current version of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), an application for Writ of Habeas Corpus from a state court judgment bears a significant burden. Section 104 of the AEDPA imparts a presumption of correctness to the state court's determination of factual issues – a presumption that petitioner can only rebut by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (1994). The statute also grants significant deference to legal conclusions announced by the state court as follows:

> An application for a writ of habeas corpus on behalf of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless adjudication on the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application

> of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d).

The United States Supreme Court, in Williams v. Taylor, 529 U.S. 362, 404-05, 120 S.Ct. 1495 (2000), interpreted the standards established by the AEDPA regarding the deference to be accorded state court legal decisions, and more clearly defined the two-part analysis set forth in the statute. Under the first part of the review, the federal habeas court must determine whether the stat court decision was "contrary to" the "clearly established federal law, as determined by the Supreme Court of the United States." As defined by Justice O'Connor, writing for the majority of the Court on this issue, a state court decision can be contrary to Supreme Court precedent in two ways: (1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or (2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to that reached by [the Su-

preme Court]." Id. Justice O'Connor explained, however, that his "contrary to" clause does not encompass the run-of-the-mill state court decisions "applying the correct legal rule from Supreme Court cases to the facts of the prisoner's case." Id. at 406.

To reach such "'run-of-the-mill" cases, the Court turned to an interpretation of the "unreasonable application" clause of § 2254(d)(1). It found that a state court decision can involve an unreasonable application of Supreme Court precedent: (1) "if the state court identifies the correct governing legal rule from the Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or (2) "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Id. at 407-08. The Court specified, however, that under this clause, "a federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 410.

III. DISCUSSION OF MERITS

Petitioner's claim have been properly exhausted in the state courts and will now be addressed on the

merits. Petitioner's claims assert that petitioner's counsel failed to provide effective assistance.

When reviewing claims of ineffective assistance of counsel, this court must view the totality of the evidence before the trial court and determine whether the petitioner has shown that the decision reached is reasonable likely to have been different, absent the alleged ineffectiveness of counsel. Strickland v. Washington, 466 U.S. 668, 695, 104 S. Ct. 2052, reh'g denied, 467 U.S. 1267, 104 S. Ct. 3562 (1984). The Sixth Amendment to the United States Constitution recognizes the right of every criminal defendant to effective assistant of counsel. U.S.Const., amend. VI. The Supreme Court has set forth a two-prong test – both parts of which must be satisfied – by which claims alleging counsel's ineffectiveness are adjudged. Id. at 668. First, the petitioner must demonstrate that his trial counsel's performance fell below an "objective standard of reasonableness." Id. The Supreme Court has explained that:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstance of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge

> a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." Id. at 689 (quoting Michel v. Lousiana, 350 U.S. 91, 76 S.Ct. 158, 163-64 (1955))

A convicted defendant asserting ineffective assistance must be therefore identify the acts or omissions that are alleged not to have been the result of reasoned professional judgment. Id. at 690. Then the reviewing court must determine whether, in light of all circumstances, the identified acts or omissions were outside "the wide range of professionally competent assistance." Id. Under Pennsylvania law, counsel is not ineffective for failing to raise baseless or frivolous issues. Commonwealth v. Wilson, 393 A.2d 1141, 1143 (Pa. 1978).

Second, the petitioner must demonstrate that his counsel's deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. To establish prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Id. at 694. A reviewing court need not determine whether counsel's performance was deficient before considering whether the peti-

tioner suffered any prejudice as a result of the alleged deficiency. If it is easier to dispose of an ineffectiveness claim for lack of the requisite prejudice, that course should be followed. Id at 697.

In the case at bar, petitioner's first claim is that counsel was ineffective for failing to preserve on direct appeal the issue of whether the trial court erred in refusing to instruct the jury regarding voluntary manslaughter. Petitioner claims that counsel should have included the issue of whether the trial court erred in refusing to instruct the jury regarding voluntary manslaughter in the Statement of Matters to be Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). The Superior Court reviewed this claim and found it meritless. We agree.

Petitioner claims that the trial court should have instructed the jury on voluntary manslaughter. Petitioner claims there was sufficient evidence to support such an instruction. Petitioner's habeas petition says the evidence to support such an instruction was testimony that the victim and his armed cohorts surrounded and confronted petitioner in an aggressive manner. Petitioner cites testimony from the victim's brother that the victim had a gun in his pocket and must have pulled it out before he was shot. Petitioner then cites testimony of Miguel Quinones, petitioner's friend, which contradicts the testimony of the victim's brother. Miguel Quinones

testified that the victim was unarmed but started blowing his chest up at petitioner. Petitioner fails to cite the facts that petitioner went to the victim's location armed with a gun and according to petitioners' own friend shot the unarmed victim. Petitioner claims that trial counsel was ineffective for failing to preserve the claim on direct appeal that the trial court should have instructed on voluntary manslaughter.

Voluntary manslaughter is an intentional killing without malice. Such a killing occurs in the heat of passion where the defendant has been adequately provoked and there has been sufficient time for his blood to cool, or, where the defendant acts on an actual, but unreasonable belief that his killing is in self defense. Commonwealth v. Garcia, 535 A.2d 1186 (Pa.Super.1988). An "objective" test is used to determine whether or not the defendant killed his victim in the heat of passion with adequate provocation. Commonwealth v. Miller, 374 A.2d 1273 (Pa. 1977). It is the duty of the fact finder to determine whether or not the crime was committed in self defense, and thus, whether or not it may be classified as voluntary manslaughter. Commonwealth v. Hill, 629 A.2d 949 (Pa.Super. 1993); McClain, 587 A.2d at 798; Garcia, 535 A.2d at 1186.

Here, the Superior Court reviewed this claim and denied it. The Superior Court explained that:

> Even assuming arguendo that [petitioner's] rendition of the evidence could support an inference that the victim's actions created reasonable provocation, the evidence does not support an inference that [petitioner] was in fact provoked, i.e., that he acted in the heat of passion. It would not have been proper for the jury to conclude, based on the evidence presented, that [petitioner] acted while actually in a state of rage or passion. Rather, the jury would have been required to speculate concerning [petitioner's] actual mental/emotional reaction to the alleged provocation. Therefore, we determine that on the basis of the evidence of record, the trial court did not err in declining to instruct the jury regarding voluntary manslaughter.

It can not be said that the Superior Court's rejection of this claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court in Williams, 529 U.S. at 409-411. The evidence failed to show that petitioner was adequately provoked by the victim. Petitioner's trial counsel can not be said to have been ineffective for failing to preserve a meritless claim. As such, we must dismiss the habeas petition as to this claim.

Petitioner's second claim is that trial counsel was ineffective for failing to object to the jury instructions regarding first and third degree murder with respect to the element of malice. Petitioner claims that the trial court failed to correctly instruct the jury on the distinction between malice required for first degree murder and malice required for third degree murder. Petitioner claims that the jury asked for clarification on malice required for third degree murder, and the trial court instructed that all forms of malice qualify for third degree murder. Petitioner argues that the trial court should have made it clear that malice for first degree murder requires intent to kill and malice for third degree murder requires intent to inflict serious bodily injury or to act with extreme indifference to the value of human life. The Superior Court reviewed this claim and found it was meritless because petitioner failed to prove prejudice. We agree and find this claim meritless.

The Superior Court found the issue was moot because plaintiff was convicted of third degree murder and not first degree murder. The jury was given an instruction on first degree murder and third degree murder. If the jury did understand the instruction, as petitioner alleges, to mean the malice for third degree murder included intent to kill, that could have benefitted petitioner. If the jury found petitioner had the specific intent to kill they then could have found petitioner guilty of third degree murder instead of first degree murder, if the trial court's in-

struction was understood as petitioner claims it was. Given that petitioner was convicted of the lesser degree of murder, third degree, petitioner has failed to prove that he was prejudiced by any failure of trial counsel to object to the jury instruction on malice. Petitioner can not prove that the outcome of the trial would have been different had petitioner's trial counsel requested further jury instructions, as is required to prove ineffective assistance of counsel. We can not find that trial counsel was ineffective as to this claim. As such, we must dismiss the habeas petition as to this claim.

Petitioner's third claim is that trial counsel was ineffective for failing to properly cross examine prosecution witness, Joel Colon. Petitioner claims that Joel Colon testified at trial that petitioner was the sole shooter but in two court statements to police Joel Colon stated that petitioner Miguel Quinones were both shooting the victim. Petitioner asserts that trial counsel should have cross examined Joel Colon about these inconsistent statements. The Superior Court reviewed this claim and found it meritless. We agree.

The Superior Court explained that at the evidentiary hearing for petitioner's PCRA petition, trial counsel testified that the defense theory was that petitioner was not involved in the shooting at all, but rather petitioner was a passerby who was shot with

a stray bullet. Counsel testified that it would have been harmful to question Joel Colon about the two statements he made to police where Joel Colon consistently stated that petitioner was a shooter in the incident that lead to the victim's death. Trial counsel's decision did not fall below an "objective standard of reasonableness" as required by Srickland, According to Strickland petitioner needs to identify the acts or omission that are alleged not to have been the result of reasoned professional judgment. Strickland, 466 U.S. at 690. Then the court must determine, in light of all the circumstances, the identified acts of omissions were outside "the wide range of professionally competent assistance." Id. . It can not be found here that trial counsel's decision not to reiterate to the jury that Joel Colon told police on two separate occasions that petitioner was at least one of two shooters was outside the wide range of professionally competent assistance. Petitioner has failed to prove that trial counsel provided ineffective assistance of counsel. Therefore, we mush dismiss the habeas petition as to this claim, and in its entirety.

Therefore, I make the following:

RECOMMENDATION

AND NOW, this 27th day of March 2009, IT IS RESPECTFULLY RECOMMENDED that the petition for Writ of Habeas Corpus be DENIED AND DISMISSED. It is also RECOMMENDED that a certificate of appealability not be granted.

BY THE COURT:

_____

LINDA K. CARACAPPA
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CESAR BARROS, Petitioner,	:	CIVIL ACTION
v.	:	
	:	No. 07-1300
JEFFREY BEARD, et al. Respondent.	:	

ORDER

EDUARDO C. ROBRENO, J.

AND NOW, this _____day of_____, 2009, upon careful and independent consideration of the petition for Writ of *Habeas Corpus*, and after review of the Report and Recommendation of United States Magistrate Judge Linda K. Caracappa, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.

2. The petition for Writ of *Habeas Corpus* is DENIED with prejudice.

3. There is no probable cause to issue a certificate of appealability

4. The Clerk of the Court shall mark this case closed for statistical purposes.

BY THE COURT:

_____

EDUARDO C. ROBRENO, J.

APPENDIX D – PETITION FOR REHEARING EN BANC, FILED AUGUST 9, 2010

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 09-3889

CESAR XAVER BARROS

VS.

JEFFREY BEARD, Secretary, et al.

(E.D. Pa. No. 2-07-cv-01300)

Present: FUENTES, JORDAN AND HARDIMAN,
Circuit Judges

SUR PETITION FOR PANEL REHEARING

The petition for panel rehearing filed by Appellant having been submitted to all judges who participated in the decision of this court, and a majority of the judges who concurred in the decision not having asked for rehearing, it is hereby ORDERED that the petition for panel rehearing is hereby DENIED.

BY THE COURT:

/s/ Thomas M. Hardiman
Circuit Judge

Dated: 9 August 2010

APPENDIX E – APPLICATION FOR HABEAS CORPUS UNDER 28 U.S.C. §2254, FILED MARCH 30, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

FORM FOR USE IN APPLICATIONS FOR
HABEAS CORPUS UNDER 28 U.S.C. § 2254

CESAR XAVER BARROS

v. 07-1300

JEFFREY BEARD, SECRETARY

The District Attorney of the County of Lehigh
and
The Attorney General of the State of Pennsylvania

Cesar Xaver Barros EM-3652
SCI Huntingdon, PA

(If Petitioner is attacking a judgment which imposed a sentences to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28

U.S.C. §2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

INSTRUCTIONS – READ CAREFULLY

1. You must include all potential claims and supporting facts for which you might desire to seek review because a second or successive habeas corpus petition cannot be filed except under very specific and rare circumstances requiring certification by the Third Circuit Court of Appeals as set forth in instruction # 13.

2. Your habeas corpus petition must be filed within the 1-year statute of limitations time limit set forth in 28 U.S.C. § 2244 (d)(1). (There are limited circumstances in which the petition may be amended, within the one-year time period, to add additional claims or facts, see Federal Rules of Civil Procedure 15; or amended after the one-year period expires, in order to clarify or amplify claims which were timely presented, see United States v. Thomas, 221 F.3d 430 (3d Cir. 2000)

3. Any false statement of a material fact in your petition, in a motion for leave to proceed in forma pauperis, or in any other motion you file in this case may serve s the basis for prosecution and conviction for perjury.

4. This petition must be typewritten, printed, or legibly handwritten and signed by you as the petitioner or by your representative on Page 11. You should answer all questions concisely in the proper space of the petition. If you need more room to answer any question, you may write on the reverse blank sides of the petition.

5. You may not attach additional pages to the petition. You do not have to list or cite the cases or law that you are relying on. If you do want to cite the cases and law you are relying on and make legal arguments, you should do so in a separate concise brief or memorandum which should be filed along with petition.

6. When you file your petition, you must include a filing fee of $5.00. If you cannot pay the full filing fee, you must request permission to proceed in forma pauperis as explained in instruction #8.

7. Your petition will be filed if you have followed these instructions and it is in proper order.

8. To request permission to proceed in forma pauperis without paying the full filing fee, you must completely fill out pages 12 through 18 of the petition. You should answer all questions and sign where indicated on Pages 12 and 18. You should see to it that an authorized prison official completes the certification on Page 19. You must prove that you cannot pay the full filing fee and other costs because of poverty and a discharge in bankruptcy will not excuse you from this requirement. The Court will let you know if you may proceed in forma pauperis.

9. Only final judgments entered by one state court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

10. As required by 28 U.S.C. § 2254(b)(1), you must have exhausted all claims that you are making in your petition. This means that every claim must have been presented to each level of the state courts. If you file a petition that contains claims that are not exhausted, the federal court will dismiss your petition. 28 U.S.C. § 2254(b)(2) provides that if it is

perfectly clear that no colorable claims are presented, the federal court can also deny your petition on the merits.

11. As required by 28 U.S.C. § (e)(1), a federal court, when considering your habeas corpus petition, must deem as correct a determination of fact made by a state court unless you rebut the presumption of correctness by clear and convincing evidence. Under 28 U.S.C. § 2254(e)(2), if you have failed to develop the factual basis of a claim in state court proceedings, a federal court cannot hold an evidentiary hearing on the claim unless you show that:

    (i) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the U.S. Supreme Court, that was previously unavailable, or

    (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence.

    You must also show that the facts underlying the claim would be suffi

cient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found you guilty of the offense in question.

12. As required by 28 U.S.C. § 2244(b)(1), a federal court must dismiss any claim in a second or successive habeas corpus petition that was presented in a prior habeas corpus petition.

13. As required by 28 U.S.C. § 2244(b)(2), a federal court must dismiss any claim in a second or successive habeas corpus petition that *was not* presented in a prior habeas corpus petition unless you show:

(A) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the U.S. Supreme Court, that was previously unavailable;

or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence, and (ii) the facts underlying

the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found you guilty of the offense in question.

Before such a second or successive petition may be filed in the district court, however, the petitioner must move the court of appeals for an Order authorizing the district court to consider the petition. Petitioner's motion for such an Order must be determined by a there judge panel of the court of appeals, which must grant or deny the motion within 30 days. The court or appeals may grant the motion only if it determines that the petition makes a prima facie showing that it satisfied either (A) or (B) above.

14. 28 U.S.C. § 2254(i) provides that ineffectiveness of counsel during post-conviction, habeas corpus and P.C.R.A. proceedings in state or federal court may not be grounds for relief in your petition.

15. When the petition is fully completed, the **original and four copies** must be mailed to the **Clerk of the United States District Court, Room 2609, 601 Market Street, Philadelphia, PA 19106.** You must return all pages, included these instructions.

PETITION

1. (a) Name and location of court which entered the judgment of conviction under attack:

   Lehigh County Court of Common Pleas

   (b) Name of Prosecutor: Christie F. Bonesch, Esq.

   (c) Prosecution conducted by District Attorney's Office of Lehigh County

2. (a) Date of Judgment of conviction: November 3, 2000

   (b) Indictment number or numbers: Criminal SMSM, #212 of 2000

3. Length of sentence: 21-45 years

   Sentencing Judge: William Ford

4. Nature of offense or offenses for which you were convicted: Murder of the Third Degree and violation of the Uniform Firearms Act

5. What was your plea? (Check One)

   (a) Not guilty (x) (b) Guilty ( ) (c) Nolo contendere ( )

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial? (Check one) (a) Jury (x) (b) Judge Only ()

7. Did you testify at the trial Yes() No (x)

8. Did you appeal from the judgment of conviction ? Yes (x) No ()

9. If you did appeal, answer the following:

   (a) Name of court: Superior Court of PA

   (b) Result: Affirmed

   (c) Date of result and citation, if known: December 23, 2003

   (d) Ground raised: Ineffective Assistance of Counsel

   (e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

      (1) Name of court:

      (2) Result:

      (3) Date of result and citation, if known:

(4) Grounds raised:

(f) if you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court:

(2) Result

(3) Date of result and citation, if known:

(4) Grounds raised:

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal Yes(x) No ()

11. If your answer to 10 was "yes", give the following information:

(a) (1) Name of Court: Common Pleas Court of Lehigh County

(2) Nature of Proceeding: Post Conviction Relief Act Petition

(3) Grounds raised: Ineffective Assistance of Counsel

(4) Did you received an evidentiary hearing on your petition, application or motion? Yes (x) No ()

(4) Result: Petition Denied

(5) Date of result: June 29, 2005

(6) Did you appeal the result to a higher court? Yes ( ) No ( )

Court Name(s): Superior Court of PA

Result (s): Order affirmed

Result Date (s): May 11, 2006

(b) As to any second petition, application or motion give the same information:

(1) Name of Court:

(2) Nature of proceeding:

(3) Grounds raised:

(4) Did you receive and evidentiary hearing on your petition, application or motion? Yes () No ()

(5) Result:

(6) Date of result:

(7) Did you appeal the result to a higher court? Yes ()No ()

Court Name(s)

Result(s)

Result Date(s)

(c) As to any third petition, application or motion give the same information:

(1) name of court:

(2) nature of proceeding

(3) Grounds raised:

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No ()

(5) Result:

(6) Date of Result:

(7) Did you appeal the result to a higher court? Yes () No ()

Courts Name (s)

Result(s)

Result Date(s)

(d) if you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State concisely every ground on which you claim that you are being held unlawfully. Give specific facts supporting each ground.

Caution. In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to his conviction) on which you based you allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you selected one or more of these grounds for relief, you must allege facts. The petition will be returned to

you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim.)

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim).

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel

(j) Denial of right of appeal.

A. Ground One: see reverse side of this page.

Supporting FACTS (state briefly without citing cases or law):

See reverse side of this page

B. Ground Two: see reverse side of this page

Supporting FACTS (state briefly without citing cases or law):

See reverse side of this page

C. Ground Three: See reverse side of this page

Supporting FACTS (state briefly without citing cases or law):

D. Ground Four

Supporting FACTS (state briefly without citing cases or law:

A. Ground One: Denial of effective assistance of counsel to preserve issue that the trial court had erred in refusing to instruct the jury regarding voluntary manslaughter.

There was sufficient evidence presented at Petitioner's jury trial to warrant an instruction on Voluntary Manslaughter, including testimony that the victim and his armed cohorts surrounded and confronted the Petition in an aggressive manner, thus provoking the Petitioner to react by creating a state of fear that would have impassioned a reasonable or mistaken belief in self defense sur 18 Pa.C.S. § 2503(a) or (b). This issue was adequately presented in the trial court but was not preserved in Petitioner's initial direct appeal Statement of Matters to be Complained of on Appeal sur Pa.R.App.Pro 1925(b) filed by trial counsel and was dismissed solely on this procedural basis by the Superior Court. When the record is reviewed in a light most favorable to the Petitioner, as was required by Penn-

sylvania law, the judge abused his discretion by failing to provide the jury with the option of a guilty verdict as to Voluntary Manslaughter. The Petitioner's prior attorney had no reasonable basis to omit this point of arguable merit in the Rule 1925(b) Statement. In the PCRA appeal, the Superior Court's affirmance of the denial of PCRA relief was an unreasonable application of Strickland v. Washington, 104 S. Ct. 2052 (1984), in that the record support the giving of this instruction, thus depriving the Petitioner of due process of law. The Petitioner was prejudiced since the jury's verdict could have thereby been guilty of a degree of criminal homicide less than Murder of the Third Degree.

B. Ground Two: Denial of effective assistance of counsel in failing to demand that the trail judge properly distinguish murder of the first degree and murder of the third degree with respect to the element of malice.

Trial counsel should have objective when the trial judge instructed the jury that the element of malice for murder of the third degree exists if the slayer acts with an intent to kill, which is contrary to Pennsylvania law. When the jury asked the trial judge to redefine these terms, the court instructed that "all forms of malice qualify for Third Degree Murder", including intent to kill. The trial court was not asked to instruct the jury that the element of

malice for Murder of the Third Degree does not involve an intent to kill, there by causing undue confusion in the jury's deliberations. The failure to correctly define these elements violated the Petitioner's right to due process of law. The cumulative effect of this error along with the omission of a jury charge regarding Voluntary Manslaughter caused prejudice to the Petitioner as the jury would have fairly understood the true range of choices it had in deciding this criminal case.

C. Ground Three: Denial of effective assistance of counsel in failing to properly cross examine a crucial prosecution witness, Joel Colon.

Joel Colon testified for the prosecution at trial and identified for the prosecution at trial and identified the Petitioner as the sole perpetrator of this shooting. A codefendant, Miguel Quinones, testified that he was present but had no weapon and was not he shooter. Another prosecution eyewitness, Jacqueline Close, testified that she saw the incident and that Miguel Quinones was the shooter. In two police statements that were not used at trial, Colon stated that both Petitioner and Quinones were shooting at the victim. The prosecutor argued to the jury in her closing address that Ms. Close's testimony was mistaken and the Petitioner was the sole perpetrator. Therefore, the Petitioner's trial counsel was ineffec-

tive by unreasonably failing to pursue the course of arguable merit of challenging Joel Colon's inculpatory testimony with these prior police interviews. This resulted in prejudicing the Petitioner's right to a fair trial in view of the Petitioner's trial defense that the shooter was Miguel Quinones. Therefore, the Petitioner is entitled to the award of a new trial for this reason as well as the above claims of ineffective assistance of counsel.

12. If any of the grounds listed in 12A,B,C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them.

13. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes () No (x)

14. Give the name and address , if known of each attorney who represented you in the following states of the judgment attacked herein:

    (a) at preliminary Hearing: James Heidecker, Jr., Esq. Allentown, PA

    (b) At arraignment and plea: same

    (c) At trial : same

    (d) At sentencing: same

(e) On appeal: Burton A. Rose, Esq. Philadelphia, PA

(f) In any post-conviction proceeding: same

(g) On appeal from any adverse ruling in a post-conviction proceeding: same

15. Were you sentences on more than one count of an indictment, or on more than one indictment, in the same court at the same time Yes (x) No ()

16. Do you have any future sentence or serve after you complete the sentence imposed by the judgment under attack?

(a) If so, give name and location of court which imposed sentence to be serviced in the future:

(b) And give date and length of sentence to be served in the future

(c) Have you filed or do you comtemplate, filing, any petition attacking the judgment which imposed the sentence to be served in the future Yes () No ()

I declare under penalty of perjury that the foregoing is true and correct

Executed on 3-20-07 Cesar Barros

APPENDIX F – NOTICE OF APPEAL, FILED OCTOBER 1, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CESAR XAVER BARROS, Petitioner	:	Civil Action 07-1300
v.	:	
JEFFREY BEARD, et al, Respondents	:	HABEAS CORPUS

NOTICE OF APPEAL

COMES NOW, Cesar Xaver Barros, Petitioner in the above entitled matter pursuant to 28 U.S. Code §2254, by his attorney, Burton A. Rose, Esquire, and hereby respectfully gives notice of an appeal to the United States Court of Appeals for the Third Circuit from the Order of the United States District Court for the Eastern District of Pennsylvania the Honorable Eduardo C. Robreno, dated September 4, 2009

and filed of record on September 8, 2009, denying the Petitioner's Petition for a Writ of Habeas Corpus and declining to issue a Certificate of Appealability, a true and correct copy of which is attached hereto.

Respectfully submitted,

2021 BAR
BURTON A. ROSE
Attorney for Cesar Xavier Barros,
Petitioner

1731 Spring Garden Street
Philadelphia, PA 19130
(215) 564-5550

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CESAR XAVER BARROS, Petitioner	:	Civil Action No: 07-1300
v.	:	
JEFFREY BEARD, et al, Respondents	:	HABEAS CORPUS

CERTIFICATE OF SERVICE

COMES NOW, Burton A. Rose, Attorney for Cesar Xaver Barros, in the above captioned matter, and hereby respectfully certifies that a true and correct copy of the attached Notice of Appeal for Defendant has been forwarded by First Class Mail to:

Honorable Eduardo C. Robreno
U,S, District Court for the Eastern District of PA
U.S. Courthouse
601 Market Street, Room 11614
Philadelphia, PA 19106

Christie F. Bonesch, Esquire
Assistant District Attorney
Lehigh County Courthouse
455 W. Hamilton Street
Allentown, PA 18104-1614

Respectfully submitted,

2021 BAR
BURTON A. ROSE
Attorney for Cesar Xaver Barros

DATED: October 1, 2009

APPENDIX G – APPLICATION FOR CERTIFICATE OF APPEALABILITY, FILED NOVEMBER 3, 2009

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CESAR XAVER BARROS, Petitioner	:	
V.	:	NO.: 09-3889
JEFFREY BEARD, et al, Respondents	:	

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT:

APPLICATION FOR CERTIFICATE OF APPEALABILITY

COMES NOW, Cesar Xaver Barros, Appellant in the above captioned appeal, under 28 U.S. Code §2254, by his attorney, Burton A. Rose, Esquire, and hereby respectfully moves this Honorable Court to issue a Certificate of Appealability pursuant to 28

U.S. Code §2253, and to grant review of his application for a writ of habeas corpus, and in support thereof represents the following:

1. This matter arises from an incident which occurred on December 3, 1999 in Allentown, Pennsylvania, at which time Gamaliel Colon was shot to death. The Petitioner Cesar Xaver Barros was charged with murder, Conspiracy and related offenses in the Court of Common Pleas of Lehigh County as per Criminal Division Docket Number 0212/2000. Following a trial by jury before the Honorable William E. Ford, the Petitioner was convicted of Murder of the Third Degree and VUFA on November 3, 2000. On December 19, 2000, Judge Ford sentenced the Petitioner to a total term of not less than 21 nor more than 45 years imprisonment.

2. The Petitioner took a direct appeal to the Superior Court of Pennsylvania as per No. 307 EDA 2001. On December 23, 2003, that Court affirmed the judgment of sentence. Petitioner's claims of ineffective assistance of counsel which had been advanced in that appeal were dismissed without prejudice so that the Petitioner could present such claims in a PCRA petition. On April 12, 2004, the Peti

tioner filed said petition. Following an evidentiary hearing on November 17, 2004,

Judge Ford denied the PCRA Petition in an Order dated June 29, 2005. On May 11, 2006, the Superior Court affirmed that Order. The Petitioner filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania on June 8, 2006 but the same was denied by Order dated December 5, 2006.

3. The Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Pennsylvania on March 20, 2007. In that petition, the Petitioner alleged three claims of ineffective assistance of counsel in contravention of the rule set forth in **Strickland v. Washington**, 466 U.S. 668 (1984). Those claims were the following:

   (a) There was sufficient evidence presented at Petitioner's jury trial to warrant an instruction on Voluntary Manslaughter, including testimony that the victim and his armed cohorts surrounded and confronted the Petitioner in an aggressive manner, thus provoking the Petitioner to react by creating a

state of fear that would have impassioned a reasonable man to act without cool reflection, or to act to defend himself due to an unreasonable or mistaken belief in self-defense sur 18 Pa.C.S. § 2503(a) or (b). This issue was adequately presented in the trial court but was not preserved in Petitioner's initial direct appeal Statement of Matters to be Complained of on Appeal sur Pa.R.App.Pro 1925(b) filed by trial counsel and was dismissed solely on this procedural basis by the Superior Court. When the record is viewed in a light most favorable to the Petitioner, as was required by Pennsylvania law, the judge abused his discretion by failing to provide the jury with the option of a guilty verdict as to Voluntary Manslaughter. The Petitioner's prior attorney had no reasonable basis to omit this point of arguable merit in the Rule 1925(b) Statement. In the PCRA appeal, the Superior Court's affirmance of the denial of PCRA relief was an unreasonable application of Strickland v. Washington, supra, in that the record supported

the giving of this instruction, thus depriving the Petitioner of due process of law. The Petitioner was prejudiced since the jury's verdict could have thereby been guilty of a degree of criminal homicide less than Murder of the Third Degree.

(b) Trial counsel should have objected when the trial judge instructed the jury that the element of malice for murder of the third degree exists if the slayer acts with an intent to kill, which is contrary to Pennsylvania law. When the jury asked the trial judge to redefine these terms, the court instructed that "all forms of malice qualify for Third Degree Murder", including intent to kill. The trial court was not asked to instruct the jury that the element of malice for Murder of the Third Degree does not involve an intent to kill, thereby causing undue confusion in the jury's deliberations. The failure to demand that the trial judge correctly define these elements violated the Petitioner's right to due process of law.

(c) The cumulative effect of this error along with the omission of a jury charge regarding Voluntary Manslaughter caused prejudice to the Petitioner as the jury would not have fairly understood the true range of choices it had in deciding this criminal case.

(d) Joel Colon testified for the prosecution at trial and identified the Petitioner as the sole perpetrator of this shooting. A codefendant, Miguel Quinones, testified that he was present but had no weapon and was not the shooter. Another prosecution eyewitness, Jacqueline Close, testified that she saw the incident and that Miguel Quinones was the shooter. In two police statements that were not used at trial, Colon stated that both Petitioner and Quinones were shooting at the victim. The prosecutor argued to the jury in her closing address that Ms. Close's testimony was mistaken and that the Petitioner was the sole perpetrator. Therefore, the Petitioner's trail counsel was ineffective by unreasonable failing to pursue this

(c) course of arguable merit of challenging Joel Colon's inculpatory testimony with these prior police interviews. This resulted in prejudicing the Petitioner's right to a fair trial in view of the Petitioner's trial defense that the shooter was Miguel Quinones. Therefore, the Petitioner claimed that he was entitled to the award of a new trial for this reason as well.

5. The Petition was assigned to the Honorable Linda K. Caracappa, United States Magistrate Judge, who issued a Report and Recommendation on March 27, 2009 recommending that the petition be denied. Counsel for the Petitioner filed a Statement of Objections to that Report and Recommendation with United States District Judge Eduardo C. Robreno. By Memorandum filed September 4, 2009, Judge Robreno has denied Petitioner's Petition for a Writ of Habeas Corpus and has not issued a Certificate of Appealability. Barros v. Beard, et al, 2009 WL 2924530 (E.D.Pa.2009).
6. The petitioner has filed a timely Notice of Appeal on October 1, 2009 seeking review of Judge Robreno's ruling and the decision to deny a Certificate of Appealability.

7. The Petitioner respectfully submits that the three claims of the ineffectiveness of counsel which were presented in this habeas corpus petition are of such nature that jurists of reason would find it debatable whether the Petition states a valid claim of the denial of that constitutional right and whether the District

8. Court was correct in its ruling against Petitioner. Slack v. McDaniel, 529 U.S. 473, 484(2000).
9. The Petitioner respectfully incorporates by reference, as though the same were fully set forth herein, the arguments presented on his behalf in the attached Memorandum of Law in Support of Application for a Certificate of Appelability.

WHEREFORE, Cesar Xaver Barros, Petitioner in the lower court and Appellant herein, respectfully prays that this Honorable Court grant this application and issue a Certificate of Appealability and allow his appeal to proceed pursuant to 28 U.S. Code §2253.

Respectfully submitted,

BURTON A. ROSE
Attorney for Cesar Xaver Barros

Dated: November 3, 2009

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CESAR XAVER BARROS, Petitioner	:	
v.	:	NO.: 09-3889
JEFFREY BEARD, et al, Respondents	:	

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT:

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR CERTIFICATE OF APPEALABILITY

INTRODUCTION

The Petitioner Cesar Xaver Barros respectfully submits that the three claims of ineffective assistance of counsel that he has presented in the instant Petition for a Writ of Habeas Corpus under 28 U.S. Code §2254 represent a substantial showing of the denial of that constitutional right as required by 28 U.S. Code §2253(c). The Petitioner therefore asks

this Court on review to consider that the contentions presented by this Petition would be debatable among jurists of reason and are significant enough to deserve encouragement to proceed further. Slack v. McDaniel, 529 U.S. 473 (2000).

II. VOLUNTARY MANSLAUGHTER INSTRUCTION

Your Petitioner objects to the conclusion of the United States District Court that the Superior Court of Pennsylvania's decision rejecting his claim of ineffective assistance of counsel with respect to the instruction concerning the offense of voluntary manslaughter was not an unreasonable application of clearly established federal law under Strickland v. Washington, 466 U.S. 668 (1984). The Petitioner respectfully disagrees with the lower court's determination that the evidence at his trial failed to show that the Petitioner was entitled to a jury instruction on the offense of Voluntary Manslaughter.

Petitioner notes that at trial of this case, trial counsel for the Petitioner requested an instruction as to the offense of Voluntary Manslaughter and contended that a key Commonwealth accomplice witness, Miguel Quinones, had testified as to significant aggressive behavior on the part of the victim, Gamaliel Colon, towards the Petitioner just before the shooting, which would have established a rea-

sonable basis for the jury to return such a verdict. The trial judge ruled, however, that there would be no instruction regarding voluntary manslaughter due to lack of evidence that the Petitioner acted in either the heat of passion or with regard to mistaken self defense.

Under the law of Pennsylvania, a voluntary manslaughter instruction is warranted where the offense is at issue and the evidence could reasonably support such a verdict. Commonwealth v. Robinson, 721 A.2d 344, 353 (Pa. 1998); United States ex rel. Matthews v. Johnson, 503 F. 2d 339 (3rd. Cir. 1974). "Heat of passion" under 18 Pa.C.S. 2503(a) includes emotions such as anger, sudden resentment or terror, where such emotions may render the mind incapable of reason. Commonwealth v. Speight, 677 A.2d 317, 324 (Pa. 1996). In this case, the Superior Court and Judge Robreno have relied upon the fact that the Petitioner did not testify to establish that he was provoked by terror or passion, but this determination should not be deemed controlling as a matter of due process of law. The Petitioner respectfully submits that whether a provocation on the part of a victim was sufficient to support a verdict of voluntary manslaughter is to be determined by an objective standard, i.e., whether a reasonable man, confronted by the same series of events, would have become impassioned to the extent that his mind

would have been incapable of acting with cool reflection. Commonwealth v. McCusker, 448 Pa. 382, 389-390 (1972); Commonwealth v. Harris, 472 Pa. 406, 408 (1977). The jury should have been instructed that if it found that the accused had been confronted with adequate provocation, the focus would then shift to whether there was evidence that would have supported an inference that the Petitioner had acted in the heat of passion as a result of that provocation. The law in Pennsylvania does not require the evidence to establish that the Defendant was motivated by the mental element (passion, terror, etc), only that it shows that the Defendant had no objectively reasonable belief force was necessary at that moment to protect himself from death or serious bodily injury. Commonwealth v. Cain, 398 A.2d 1359, 1362 (Pa. 1979). The law does not require proof that the Defendant's fear or apprehension reach such an intensity as to block cool reflection and that the shooting resulted from those emotions. Id. at 1363. Therefore, Judge Robreno's contrary conclusion (Memorandum, page 7) should not stand.

Petitioner submits that as a matter of due process of law, the Petitioner cannot be penalized because he did not take the stand. Neither the Superior Court's Opinion nor Judge Robreno's cites any cases that hold that he must testify in order to be entitled to such an instruction. To the contrary, see Common-

wealth v. Monroe, 322 A.2d 100, 101 (Pa. 1974) (even though defendant did not take the stand, jury can infer defendant's act of shooting victim was motivated by fear of danger from group of men advancing towards him in a threatening manner so as to support a verdict of voluntary manslaughter).

In addition to the concept of passion and provocation, voluntary manslaughter could also have been found if the Petitioner acted out of an unreasonable or mistaken belief that self-defense was then and there necessary pursuant to §2503(b). See Suggested Standard Jury Instruction in Criminal Cases, § 15.2503A and Commonwealth v. Galloway, 485 A.2d 776 (Pa.Super. 1984). Here, the jury should have been instructed that if justification was not established, the killing could have been voluntary (and not murder) if the jury found that the Petitioner believed that the killing was committed pursuant to a belief that the use of deadly force was necessary in order to defend himself against death or serious injury, even through that belief may have turned out to have been mistaken or unreasonable. Under Commonwealth v. Naub, 473 Pa. 1 (1977), a person who commits unreasonable belief voluntary manslaughter may hold his mistaken belief about the necessity of self defense without being subject to the strong emotion of sudden passion or he "may be mistaken because he was the aggressor" or was other

wise not entitled to use deadly force. Commonwealth v. Galloway, supra at 784.

Accordingly, the Petitioner respectfully submits that unreasonable belief voluntary manslaughter and/or heat of passion voluntary manslaughter had been made an issue in the case and that the evidence could have reasonably supported such a verdict. Because Pennsylvania law provides that the evidence should have been viewed in a light most favorable to the accused in determining whether he was entitled to this instruction, Commonwealth v. Morris, 424 A.2d 1336, 1337 (Pa.1981), the trial judge's refusal to give this charge was error.

The trial testimony that the Petitioner relies upon is the following. In the direct examination of key Commonwealth witness Joel Colon, Colon testified that on December 3, 1999 at sometime after midnight, there was a knock on the door of the residence in which were the victim, Gamaliel Colon, Joel Colon, the victim's girlfriend Jennifer Negron and a friend named "Sess". Gamaliel went to the door and then said, "Oh, shit, it's Ces (the Petitioner), Mike (Miguel Quinones) and Ralph. According to Joel Colon, his brother Gamaliel went to get his gun and bullet proof vest and then went outside, followed by Joel Colon. Outside in the parking lot, according to Joel Colon, he saw a flash coming from Petitioner's direction towards his brother.

After Joel Colon realized that his brother was shot, he noted that a gun was lying next to his brother, which Joel then grabbed and used to fire twelve (12) shots in the direction of the Petitioner. Petitioner received two bullet wounds.

According to Joel Colon, his brother Gamaliel had the gun in his jeans pant pocket. When Joel Colon saw it after the shooting, the gun was lying next to the shoulder area of Gamaliel. According to Joel Colon, it was "obvious" to him that his brother tried to pull out the gun before he was shot, and then had dropped the gun to the ground.

Commonwealth witness Jennifer Negron testified that her boyfriend Gamaliel Colon was "a lot bigger in size" than this Petitioner. Pathologist Sarah Funke M.D., testified that Gamaliel Colon was 22 years old and weighed 220 pounds. Commonwealth accomplice witness Miguel Quinones also testified that Joel and Gamaliel Colon were "much bigger" than either Miguel Quinones or Cesar Barros; in addition, the Colon brothers' friend Sess was also "a pretty big guy".

Miguel Quinones testified as to his version of these events, which differed from the testimony of Joel Colon. According to Quinones, he, "Ralph" and the Petitioner went to Joel Colon's house where the Petitioner knocked on the door. Quinones testified

that Gamaliel, Sess and Joel came out of the house, with Joel pointing a gun. Quinones testified that "Sess" had a gun in his hand as well. Quinines testified that Joel Colon waved a gun in the face of Quinones and Barros. At this point, Quinones testified, Gamaliel "started blowing his chest up in Cesar's face". In response, Cesar "stepped back, put his arms up and told him to back up" after which Quinones testified he heard a gunshot. Quinones also testified that at the time a gun was fired at Gamaliel Colon, the victim had his arms going forward.

Quinones also testified that he did not see the victim with a gun that night and that no one was aiming a gun at the Petitioner when Gamaliel was shot. According to Quinones, Joel Colon was about 10 to 15 feet away from the Petitioner at the time of the shooting. However, on cross-examination Quinones testified that, although Joel Colon and Sess had guns out, neither he, Ralph nor the Petitioner had guns out prior to the shooting.

Dr. Funke testified that the bullet trajectory in the victim's body was on a line from right to left and on a severely downward angle. According to Dr. Funke, at the time of being shot, the victim could have been "bending his knees", and therefore may have been in a posture where the victim was crouched over and charging at the petitioner.

Based upon the above trial evidence, the Petitioner respectfully submits that the trial judge should have granted the Petitioner's request that the jury be instructed regarding Voluntary Manslaughter, either as to 18 Pa.C.S. § 2503(a) or §2503(b). When viewed in the light most favorable to the accused, it is clear that there was enough testimony in this record to support an inference that the Petitioner, if he was to be judged culpable for the shooting of Gamaliel Colon, did so while acting under a serious provocation. The jury could certainly have found that Gamaliel Colon, armed with a gun and bullet proof vest, aggressively approached the Petitioner, sticking his chest into the Petitioner's face, while bent over at the knees as if to charge the Petitioner, while his associates, armed with weapons, supported the victim's advance and pointed guns at the face of the Petitioner. Even without the Petitioner's testimony, the jury have could inferred from this series of events that this would have actually caused extreme terror and emotion on the part of the Petitioner. In the alternative, these acts could have generated an unreasonable or mistaken belief that the Petitioner would have had to use deadly force at that time and place in order to protect himself from what he would have perceived as a danger of death or serious bodily injury. As discussed above, the federal Constitution does not require that the Petitioner

himself must take the stand to warrant such a jury charge.

Therefore, your Petitioner respectfully submits that the Court should rule that the Petitioner's request for a voluntary manslaughter instruction should have been granted. Particularly when this issue is viewed in light of the Petitioner's claim (see next argument) regarding the trial judge's instruction concerning third degree murder and malice, the prejudice to the Petitioner becomes evident. As a result of the instructions regarding malice, the jury was incorrectly lead to believe that the offense of third degree murder could include a situation where the Petitioner acts with an intent to kill, yet in this same case, the jury was not given the option of finding the Petitioner guilty of voluntary manslaughter. The Petitioner submits that such a verdict might have occurred, based upon a theory of provocation and terror, in the alternative, upon a theory of an unreasonable or mistaken belief in self-defense, with a finding that the Petitioner acted with an intent to kill but without the deliberation and premeditation required for first degree murder.

For these reasons, the Court should reverse the lower court and order the grant of a Certificate of Appealability for the Petitioner.

II. MALICE INSTRUCTIONS

The Petitioner respectfully objects to the conclusion of the United States District Court that his claim of trial counsel ineffectiveness in failing to object to the jury instructions regarding first and third degree murder with respect to the element of malice is without merit.

When the trial court instructed the jury as to the elements of third degree murder on November 2, 2000, the court properly informed the jury that third degree murder is killing accompanied by malice; however, the court then erred by stating that malice exists for third degree murder if the slayer acts with an intent to kill. This erroneous instruction was repeated in response to a jury question on November 3, 2000. The judge also told the jury that "all forms of malice qualify for third degree murder". Trial counsel took no exception to any aspect of the trial judge's charge. When the jury resumes deliberations on the next day, they asked the trial court to define "malice, as it pertains to first degree and third degree". Without objection from counsel, the trial judge repeated the essential terms of the instruction regarding malice that has been given on the preceding day. In particular, however, when attempting to define the distinction between the malice that is required for Murder of the First Degree and that required for Murder of the Third Degree, the trial judge told the

jury that "All forms of malice qualify for Third Degree Murder" (N.T. 11/3/00, 18) (emphasis supplied).

Under the law of Pennsylvania, it is fundamental that a trial judge, in charging the jury, clarify the issues so that the jury may understand the questions to be resolved. Commonwealth v. Beach, 438 Pa.37 (1970). Thus the trial judge had the duty to apprise the jury of all the elements of those crimes for which the defendant had been charged. The trial court's instructions in that regard must be clear, concise and accurate statements of the law. Commonwealth v. Ford-Bey, 472 A.2d 1062, 1064 (Pa. 1984). While it is true that a reviewing court must consider the charge as a whole, relief is constitutionally required where these elements have not been satisfactory explained under the law. In Re Winship, 397 U.S. 358 (1970); Jacob v. Horn, 395 F. 3d 92, 111 (3d. Cir. 2005).

Although third degree murder is a killing done with malice, it should have been made clear to the jury that it is not an intentional killing, i.e., the defendant may have maliciously killed the victim but not with a specific intent to kill as is required for murder in the first degree. Commonwealth v. Pitts, 404 A.2d 1305 (Pa. 1979); Commonwealth v. Cohen, 605 A.2d 1212, 1216 (Pa. 1992). Instead, for Third Degree Murder, what is required is proof that the defendant manifested either an intention to inflict

serious bodily injury or an extreme indifference to the value of human life. Commonwealth v. Thomas, 717 A.2d 468, 479 (Pa. 1998).

The Petitioner contends that the trial court defined the offenses of Murder of the First and Third Degree in a constitutionally unacceptable manner. The trial court failed to expressly inform the jury as to Murder of the Third Degree, malice for that offense does not involve the intent to kill, and that the offense only involves the intent to inflict great bodily harm or to act with extreme indifference to the value of life. As a result, the burden of proof as to these offenses was not fairly presented to the Petitioner's jury. Johnson v. Rosemeyer, 117 F 3d. 104, 110 (3d. Cir. 1997).

Petitioner urges this Court to reject the lower court's conclusion that these confusing instructions on malice and Third Degree Murder did not prejudice the Petitioner because the jury found the Petitioner not guilty of First Degree Murder, and guilty of Third Degree Murder. Petitioner submits that this is a conclusion that rests on conjecture and that he was constitutionally entitled to have the jury accurately, fully and properly instructed as to the distinctions between the various crimes and their elements as a matter of fundamental fairness and due process of law. In re Winship, supra; Commonwealth v. Broeckey, 72 A. 2d 134, 136 (Pa. 1950);

Commonwealth v. Murphy, 739 A. 2d 141, 146 (Pa. 1999).

See also Chambers v. McDaniel, 549 F. 3d 1191 (9th Cir. 2008) (jury instructions held unconstitutional, especially where second degree murder defined as "all other kinds of murder") and Polk v. Sandoval, 503 F. 3d 903 (9th Cir 2007) (same jury instruction on premeditation held constitutionally defective). In these cases, federal habeas relief was granted on the basis of a due process of law violation.

The Petitioner respectfully submits that he had given instruction on the law that were accurate and which apprised the jurors of all the elements of the offense. Strickland v. Washington, supra; Commonwealth v. Beach, supra. In this case, the note from the jury during the deliberations asking for the trial court to once again define "malice as it pertains to first degree and third degree" shows that the jury's deliberations were influenced by these confusing instructions. When considered in light of the absence of an instruction regarding voluntary manslaughter (see previous argument), there exists a reasonable probability that the outcome of this case may well have been different had the jury understood the true range of choices that it really had with respect to its verdict in this case. Strickland, supra at 694.

Therefore, this Court should rule that the Petitioner is to be granted a Certificate of Appealability.

III. CROSS-EXAMINATION OF JOEL COLON

The Petitioner respectfully submits that he conclusion of the United States District Court that trial counsel was not ineffective for failing to properly cross-examine key prosecution witness Joel Colon regarding his inconsistent police statements, in which Joel Colon stated that not only the Petitioner but Miguel Quinones had been shooting at the victim, should be reviewed by this Court.

The Petitioner contends that prior counsel provided ineffective assistance under the federal constitution in failing to properly cross-examine key Commonwealth witness Joel Colon with his prior statements, which were inconsistent on the crucial factual issue at trial. It is fundamental that in order to provide effective assistance of counsel, trial counsel had an obligation to properly cross-examine a key Commonwealth witness. Strickland v. Washington, supra; Commonwealth v. Murphy, 591 A.2d 278 (Pa. 1991). In the instant case, the absence of proper cross-examination of key prosecution witness Joel Colon was an omission of a matter of arguable merit that would have affected the outcome of the case because Colon's previous inconsistent statements directly bore on the CREDIBILITY OF Colon and

Quinones and thus the Petitioner's culpability. Berryman v. Morton, 100 F. 3d 1089 (3d Cir. 1996); Malone v. Walls, 538 F. 2d 744, 761 (7th Cir. 2008); Harris v. Senkowski, 298 F. Supp. 2d 320, 337 (E.D.N.Y. 2004).

In the two statements attributed to Joel Colon by the Allentown Police Department, Joel Colon told the police that both Cesar Barros, Petitioner herein, and Miguel Quinones were shooting at Joel Colon and his brother Gamaliel Colon. During the trial, trial counsel for the Petitioner did not attempt to bring these references out during the cross-examination of Joel Colon, even though Joel Colon testified that the Petitioner alone shot at his brother. As to Miguel Quinones, Joel Colon testified at the trial that his eyes were focused on Miguel Quinones but he could not see Miguel Quinones' hands. Joel Colon testified that before the gun shots rang out, he saw no one with a gun. He testified that at the time of the shooting, the Petitioner, Joel Colon and Gamaliel Colon were standing in a triangle only three feet apart from each other. The prosecutor specifically asked Joel Colon whether or not Miguel Quinones was observed to have anything his hand, to which Joel Colon responded that Quinones "had his hand in his pocket" and that Joel Colon could therefore not see the hand of Miguel Quinones.

Miguel Quinones testified at the trial as a Commonwealth witness and completely denied any criminal activity in connection with the shooting of Gamaliel Colon. Quinones testified that he did not have a gun, but that guns were in the possession of Joel Colon, "See" and the Petitioner and specifically denied that he had a gun that night.

In her closing argument to the jury, the prosecutor relied upon the testimony of Joel Colon and Miguel Quinones to support her contention that this Petitioner was the shooter of Gamaliel Colon. The prosecutor argued that the testimony of Jacqueline Close, which had identified Miguel Quinones as the shooter, was mistaken.

Accordingly, the Petitioner respectfully submits that the failure on the part of trial counsel to properly use the prior police statements of Joel Colon deprived the Petitioner of his federal constitutional right to the effective assistance of trial counsel. The records shows that trial counsel was familiar with these statements, having used them for other purposes in the cross-examination of Joel Colon. Thus it was an unreasonable strategy on trial counsel's part to omit such references where Colon's trial testimony was dramatically inconsistent with his police inter

views on this crucial point. Harris v. Senkowski, supra at 338.

The lower court has accepted the conclusion of the Pennsylvania Superior Court ruled that these references could have damaged the Petitioner's defense. The Petitioner respectfully submits that this conclusion was not supported by the record as it completely ignores the defense that was actually used at the trial, to wit, that Miguel Quinones was the shooter. Rolan v. Vaughn, 445 F. 3d 671, 681 (3d Cir. 2006) (state court has made an unreasonable finding of fact where it is not supported by the record). Although the defense also took the position that the Petitioner was not a shooter, and Joel Colon's statement did refer to the Petitioner in that role as well as Quinones, the petitioner notes that the reference to the Petitioner as a shooter had been already brought out at the trial by both Joel Colon and Miguel Quinones. Therefore, another such reference attributed to Joel Colon would not have been a valid basis to forego this cross-examination, especially in light of the importance of letting the jury hear that Miguel Quinones may have been the person who fired the shot that killed Gamaliel Colon. Thus in one fell swoop, the defense could have severely undercut the credibility of their two primary witnesses, Joel Colon and Quinones.

In reviewing an ineffectiveness claim under Strickland, this Court must examine the approach employed by trial counsel in light of the available alternatives; here, the alternative not chosen (impeaching Joel Colon with the two prior police statements to establish the fact the Miguel Quinones and Joel Colon had lied and that Quinones was a shooter) clearly offered a potential for success substantially greater than the tactic actually utilized (not making that reference at all). Bell v. Millerb, 500 F. 3d 149 (2nd Cir. 2007) (no justification for state counsel having omitted impeachment that could have cast doubt upon critical evidence and bolstered defense theory); Harris v. Senkowski, supra at 340-341.

Therefore, the Petitioner submits that a new trial was warranted because the failure of trial counsel to bring out these dramatic inconsistencies with respect to the role of Miguel Quinones created a reasonable probability that the outcome of the trial may have been different had Joel conceded that Miguel Quinones was an active shooter in this incident, as this would not have only undercut the credibility of Joel Colon and Miguel Quinones, it would have supported the credibility of another key witness, Jacqueline Close, who testified at the trial that the shooter was not the petitioner but rather it was Miguel Quinones. The jury apparently did not accept Ms.

Close's testimony, which is what the prosecutor urged them to do in her closing argument. The Petitioner notes that in the decisions of the Superior Court and of Judge Robreno rejecting this claim, those courts did not consider the testimony of Jacqueline Close which, had it been supported, may well have created a reasonable doubt as to Petitioner's guilt. Therefore, the Joel Colon police statements would have bolstered the defense that Quinones was culpable and would have also served to undermine the prosecution's argument that Close was "mistaken" when she identified Quinones as the shooter. Rolan v. Vaughn, supra at 683.

As a result of this omission, the argument of Petitioner's defense attorney fell short. The evidence against the Petitioner had substantial weaknesses as these two key witnesses were vulnerable with respect to their credibility. Malone v. Wells, supra at 761. Although Joel Colon was impeached on cross-examination, he was not challenged as to his testifying that the Petitioner alone was the shooter of his brother. Thus there would have been no rational basis for this omission. Accordingly, this Court should rule that the Petitioner should be granted a Certificate of Appealability for this reason as well.

WHEREFORE, your Petitioner Cesar Xaver Barros respectfully prays this Honorable Court issue a Certificate of Appealability and grant appropriate

federal habeas relief to the Petitioner as warranted by the interests of justice and fundamental fairness.

Respectfully submitted:

/s/ BURTON A. ROSE, ESQUIRE

Attorney for Cesar Xaver Barros,
Petitioner

DATED: November 3, 2009

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CESAR XAVER BARROS,	:	
Petitioner	:	
	:	
v.	:	NO.: 09-3889
	:	
JEFFREY BEARD, et al,	:	
Respondents	:	

CERTIFICATE OF SERVICE

COMES NOW, Burton A. Rose, Attorney for Cesar Xaver Barros, in the above captioned matter, and hereby respectfully certifies that a true and correct copy of the attached APPLICATION FOR CERTIFICATE OF APPEALABILITY and PETITIONER'S MEMORANDUM IN SUPPORT OF CERTIFICATE OF APPEALABILITY has been forwarded by First Class Mail to:

Christie F. Bonesch, Esquire
Chief Deputy District Attorney
Lehigh County Courthouse
455 W. Hamilton Street
Allentown, PA 18104-1614

Respectfully submitted,

/s/ BURTON A. ROSE
Attorney for Cesar Xaver Barros

DATED: November 3, 2009

APPENDIX H – ORDER, DATED DECEMBER 22, 2009

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-3889

Barros v. Beard
(E.D. Pa. Civ. NO. 07-cv-01300)

ORDER

Appellant has appealed denial of the petition for writ of habeas corpus that he filed in the District Court. It appearing that the appeal cannot be determined without reviewing the transcripts from the criminal trial in state court, and it further appearing that these transcripts were never obtained by the District Court or forwarded to the Court of Appeals, it is hereby ORDERED that the District Court shall request that part of the state court record which contains the trial transcripts from the Criminal Clerk of Court for Lehigh County in Commonwealth v. Cesar Xaver Barros, No. 221 of 2000. Upon receipt of the record, the District Court should in turn forward it to the Court of Appeals

For the Court,

/s/Marcia M. Waldron
Clerk

Dated: December 22, 2009
MB/cc: Michael Kunz,
Honorable Eduardo C. Robreno
Burton A. Rose, Esq.
Heather F. Gallagher, Esq.

APPENDIX I – SUR PETITION FOR PANEL HEARING, FILED AUGUST 9, 2010

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 09-3889

CESAR XAVER BARROS

vs.

JEFFREY BEARD, Secretary, et al.

(E.D. Pa. No. 2-07-cv-01300)

Present: FUENTES, JORDAN AND HARDIMAN,
Circuit Judges.

SUR PETITION FOR PANEL REHEARING

The petition for panel rehearing filed by Appellant having been submitted to all judges who participated in the decision of the court, and a majority of the judges who concurred in the decision not having asked for rehearing, it is hereby ORDERED that the petition for panel rehearing is hereby DENIED.

BY THE COURT:

/s/ Thomas M. Hardiman
Circuit Judge

Dated: 9 August 2010